OFFICE SUPREME COURT, U.S.
FILED
JAN 10, 1964
JOHN F. DAVIS, CLERK

No. 743

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

SOUTHERN PILOTS ASSOCIATION, et al.,
Petitioners

v.

CIVIL AERONAUTICS BOARD,
Respondent

and

AIR LINE PILOTS ASSOCIATION,
Intervenor

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PHILIP F. HERRICK
NICHOLAS E. ALLEN
1001 15th Street, N.W.
Washington, D.C. 20005
Attorneys for Petitioners

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	3
Reasons for granting the Writ	5
Conclusion	22
Appendix A—Statutes	23
Appendix B—Opinion below	34

CITATIONS

Cases:

Air Line Pilots Ass'n. v. *Southern Airways, Inc.*, 49 L.R.R.M. 3145 (D.C.M.D. Tenn., 1962, unreported otherwise) 3, 13, 20

American Airlines v. *Air Line Pilots Ass'n.*, 169 F. Supp. 177 (D.C.S.D. N.Y., 1958) 12

Brady v. *Trans World Airlines*, 156 F. Supp. 82 (D.C.D. Del., 1957) 12

Brotherhood v. *Howard*, 343 U.S. 768 (1952) 17

Brown v. *Christman*, 126 F. 2d 625 (C.A. D.C., 1942) 18

Bullock v. *Capital Air Lines*, 176 F. Supp. 449 (D.C. E.D. N.Y., 1959) 12

Burlington Truck Lines v. *U.S.*, 371 U.S. 156 (1962) 13

Conley v. *Gibson*, 355 U.S. 41, 46 (1957) 6, 17

Consolidated Edison Company v. *N.L.R.B.*, 305 U.S. 197 (1938) 18, 19

Cunningham v. *Erie R.R.*, 266 F. 2d 411 (C.A. 2d, 1959) 17

Erie Resistor Corp. v. *N.L.R.B.*, 373 U.S. 221 (1963) 21

Page

Farris v. *Alaska Air Lines*, 113 F. Supp. 907 (D.C. W.D. Wash., 1953) 12

Florida East Coast Railway, Emergency Board Report, 54 L.R.R. 435, Dec. 30, 1963, unreported otherwise 14

Ford Motor Company v. *Huffman*, 345 U.S. 330 (1953) 17

Green v. *Brophy*, 110 F. 2d 539 (C.A. D.C., 1940) 18

Holman, et al. v. *Southern Airways, Inc.*, 210 F. Supp. 407 (D.C.N.D. Ga., 1962, appeal pending) 5

J. I. Case Co. v. *N.L.R.B.*, 321 U.S. 332 (1944) 7

Mount v. *Locomotive Engineers*, 226 F. 2d 605 (C.A. 6th, 1955, cert. den. 350 U.S. 967, 1956) 17

N.L.R.B. v. *American National Insurance Co.*, 343 U.S. 395 (1952) 16

N.L.R.B. v. *Denver Building and Construction Trades Council*, 192 F. 2d 577 (C.A. 10th, 1951) 9

N.L.R.B. v. *F. H. McGraw & Co.*, 206 F. 2d 635 (C.A. 6th, 1953) 9

N.L.R.B. v. *Insurance Agents International Union*, 361 U.S. 477 (1960) 16

N.L.R.B. v. *Lewin-Mathes Co.*, 385 F. 2d 871 (C.A. 7th, 1960) 20

N.L.R.B. v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938) 20, 21

N.L.R.B. v. *Oertel Brewing Company*, 197 F. 2d 59 (C.A. 6th, 1952) 8

N.L.R.B. v. *Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261 (1958) 8, 19

N.L.R.B. v. *Potlatch Forests*, 189 F. 2d 82 (C.A. 9th, 1951) 20

N.L.R.B. v. *United Brotherhood of Carpenters, etc.*, 181 F. 2d 126 (C.A. 6th, 1950) 9

N.L.R.B. v. *United Brotherhood of Carpenters, etc.*, 184 F. 2d 60 (C.A. 10th, 1950, cert. den. 341 U.S. 947, 1951) 8

Page

Northwest Air Lines v. *Machinists*, 178 F. Supp. 853 (D.C.D. Minn., 1959) 12
Olson v. *Miller*, 263 F. 2d 738 (C.A. D.C., 1959) 18
Outland v. *Civil Aeronautics Board*, 284 F. 2d 221 (C.A. D.C., 1960) 12, 13
Pan American World Airways v. *T.W.U.*, 51 L.R.R.M. 2170 (D.C. E.D. N.Y., 1962, unreported otherwise) 12
Sigfrid v. *Pan American Air Lines*, 122 F. Supp. 881 (D.C. S.D. Fla., 1954) 12
Steele v. *L. & N. R. Co.*, 323 U.S. 192 (1944) 17
Terminal Railroad Ass'n. v. *Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1943) 16
Texas & N. O. R. Co. v. *Brotherhood*, 281 U.S. 548 (1930) 11
Transcontinental Air Lines v. *Koppal*, 345 U.S. 653 (1953) 12
Tunstall v. *Brotherhood*, 323 U.S. 210 (1944) 17
U. S. v. *Bank of New York & Trust Company*, 296 U.S. 463 (1936) 18
Virginian Ry Co. v. *System Federation No. 40*, 300 U.S. 515 (1937) 11, 12
Williams v. *Bankhead*, 86 U.S. 563 (1874) 18

Statutes:

Section 1254(1), Judicial Code of 1911, as amended, 62 Stat. 928, 28 U.S.C. 1254(1) 2
Federal Aviation Act of 1958, as amended, 72 Stat. 731, 49 U.S.C. 1301, et seq. 2, 9
Section 1, 49 U.S.C. 1301 3
Section 401(a), 49 U.S.C. 1371(a) 10
Section 401(g), 49 U.S.C. 1371(g) 6
Section 401(k)(4), 49 U.S.C. 1371(k)(4) 6, 9, 10, 13
Section 1005(c), 49 U.S.C. 1485(c) 17
Section 1006, 49 U.S.C. 1486 4
Section 1006(a), 49 U.S.C. 1486(a) 6
Section 1006(f), 49 U.S.C. 1486(f) 2
Section 1009, 49 U.S.C. 1489 17

CITATIONS—(Continued)

	Page
Civil Aeronautics Act of 1938, as amended, 52 Stat. 973,	
Section 401(l)(4), see 49 U.S.C. 1371(k)(4)	10
Section 401(h), see 49 U.S.C. 1371(g)	10
Railway Labor Act, as amended, 44 Stat. 577, 45 U.S.C. 151 et seq.	2, 9
Section 1, 45 U.S.C. 151	3, 10, 16
Section 2, First, 45 U.S.C. 152	6, 10, 11, 17
Section 2, Third, 45 U.S.C. 152	11
Section 2, Fourth, 45 U.S.C. 152	11
Section 2, Fifth, 45 U.S.C. 152	11
Section 10, 45 U.S.C. 160	13
Title II, as added, 49 Stat. 1189, 45 U.S.C. 181 et seq.	12
National Labor Relations Act, as amended, 61 Stat. 141, 29 U.S.C. 150 et seq.	14
Miscellaneous:	
25 Federal Register 10372, 10667	3
Hearings before Senate Commerce Committee on S. 3659, 75th Cong., pp 64-67	10
Hearings before House Commerce Committee on H.R. 9738, 75th Cong., pp 213, 235-240, 366-367	10
H.R. (Conference) Report on S. 2635, 75th Cong., p 69	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. ————

SOUTHERN PILOTS ASSOCIATION, et al.,
Petitioners

v.

CIVIL AERONAUTICS BOARD,
Respondent

and

AIR LINE PILOTS ASSOCIATION,
Intervenor.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Southern Pilots Association and its individual members pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on June 13, 1963, which dismissed as moot petitioners' petition for review of orders of the Civil Aeronautics Board.

OPINION BELOW

The opinion of the court below (Appendix B) is reported at 323 F. 2d 288-290. The orders of the Civil Aeronautics Board are No. E-18560, issued July 5, 1962,

No. E-18737, issued August 27, 1962 and No. E-19162, issued January 3, 1963 (R. 2612, 2678, 2779).

JURISDICTION

The judgment of the Court of Appeals was entered on June 13, 1963, and a petition for rehearing en banc was denied October 14, 1963. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1) and Section 1006(f) of the Federal Aviation Act of 1958, 72 Stat. 795, 49 U.S.C. 1486(f).

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly dismissed as moot the petition for review.

2. Whether the Civil Aeronautics Board had jurisdiction to entertain a complaint filed by a labor union and to determine that an air carrier had failed to bargain collectively and so had violated the Railway Labor Act and the Federal Aviation Act of 1958.

3. Whether the Board had authority, under the guise of so-called "guidelines", to dictate the terms of a collective bargaining agreement.

4. Whether the labor union's failure to represent the individual petitioners before the Board invalidates the Board's proceedings.

5. Whether the proceedings before the Board were invalid because the petitioners were not parties thereto.

6. Whether the Board's findings that the air carrier failed to bargain in good faith are supported by the record.

STATUTES INVOLVED

The relevant provisions of the Federal Aviation Act of 1958 and the Railway Labor Act are set forth in Appendix A.

STATEMENT

Petitioners are aircraft pilots who were hired by Southern Airways, Inc. (Southern) after June 5, 1960 (R. 2686), together with the association which petitioners formed about September 25, 1962 (R. 2686). The individual petitioners were employed as replacements for other pilots, members of Air Line Pilots Association (ALPA), who engaged in a prolonged strike against Southern commencing June 5, 1960 over hours, wages and working conditions (R. 2561).

The proceeding before the Board (*Air Line Pilots Association v. Southern Airways, Inc.*, CAB Docket No. 11,654 (R. 2611, 2678), which resulted in the orders already mentioned, was initiated on a complaint filed by ALPA July 22, 1960 which alleged that Southern had failed to bargain with it in good faith and had thereby violated the Railway Labor Act (45 U.S.C. 151) and the Federal Aviation Act of 1958 (49 U.S.C. 1301) (R. 1-9).[1] Hearings were held before a Board examiner from December 1, 1960 to January 18, 1961, but the individual petitioners herein were not made parties to the proceeding, were not served with any notice of the proceeding, and were not called as witnesses (R. 77, 81, 1118). Notices of the hearing, published in the Federal Register, gave only the time and place of a hearing involving ALPA and Southern and did not recite facts indicating that petitioners' employment rights were in jeopardy (25 Fed. Reg. 10372 and 10667).

ALPA is and was the bargaining representative, certified as such under the Railway Labor Act, of all pilot employees of Southern (R. 2), yet it opposed the inter-

[1] ALPA also sought similar relief in the United States District Court for the Middle District of Tennessee. This proceeding culminated in a decision by that court dated February 26, 1962 and an order dated April 27, 1962, both reported as *ALPA v. Southern*, 49 L.R.R.M. 3145, and otherwise unreported.

ests of the petitioners throughout the proceeding (see, for instance, R. 3, 2562, 2584).

On July 5, 1962 the Board issued its first decision and order, No. E-18560, which, by a 3-2 majority, directed Southern to bargain with ALPA (R. 2568-2612). The order also required Southern to reinstate all of the striking pilots who had been replaced on or after July 12, 1960 and to discharge or furlough as many of the individual petitioners as might be necessary in order to accomplish this (R. 2589, 2612). This order was modified August 27, 1962 by Order No. E-18737, which required Southern to give the reinstated pilots seniority over all of the individual petitioners, including those hired prior to any possible unfair labor practice (R. 2678-2680). Southern entered into a so-called back-to-work agreement with ALPA on September 21, 1962 which purported to comply with the Board's two orders (R. 2756). As its provisions show, the purpose of this back-to-work agreement was to govern the administration and readjustments of rights of striker and non-striker pilot personnel on an interim basis until the permanent provisions of a collective employment agreement which was simultaneously negotiated could become fully effective (R. 2756-2779). Petitioners were not parties to either of these collective agreements.

Within about one month after the back-to-work agreement was made, petitioners (1) filed their petition in the court below for review of the Board orders under Section 1006 of the Federal Aviation Act of 1958 (49 U.S.C. 1486), (2) filed a petition with the Board seeking intervention, rehearing and reconsideration (R. 2586), and (3) filed a complaint in the United States District Court for the Northern District of Georgia seeking to enjoin enforcement of the back-to-work agreement. The court below denied the petition for review, solely on the ground that the said agreement had mooted the case,

that is, that this agreement had insulated the Board's orders from any effective reversal in the courts. The Board dismissed the petition filed with it (Order No. E-19162, January 3, 1963, R. 2779). The District Court in Georgia dismissed petitioners' complaint because in that court's view the complaint constituted in reality an attack upon the Board's orders and so was beyond the jurisdiction of the court (*Holman* v. *Southern Airways, Inc.*, 210 F. Supp. 407, 1962, appeal pending).

REASONS FOR GRANTING THE WRIT

1. The Case is Not Moot.

a. The Court of Appeals' dismissal of the petition for review as moot was erroneous because of the continued existence of rights and duties which are affected by the challenged orders of the Civil Aeronautics Board.

(1) Petitioners have attacked the validity of the back-to-work agreement in the Federal District Court in Georgia. That Court dismissed the complaint on the grounds that it constituted an attempted review of the Board orders which was beyond its jurisdiction. *Holman* v. *Southern Airways, Inc., supra*, appeal pending. Thus the Federal Court in Georgia held that petitioners' attack on the back-to-work agreement is barred by the petitioners' inability to reach the Board orders in that court. The Court of Appeals for the District of Columbia in the instant case held that a decision by it on the validity of the Board orders would have no effect because the rights and duties of the parties are now controlled by the back-to-work agreement. Thus petitioners are caught in a cross-fire. They cannot attack the Board orders in the Court of Appeals because of the agreement; and they cannot attack the agreement in the District Court because of the continuing vitality of the Board orders. There must be redress somewhere. If this Court were to

reverse the Board, petitioners could then pursue their remedy in the District Court.

(2) While petitioners were not formal parties to the proceedings before the Board, they do have the right to appeal the Board's orders (Federal Aviation Act, § 1006 (a), 49 U.S.C. 1486(a)). This right cannot be destroyed by the unilateral action of the two formal parties. If it can be, the command of the statute relative to the parties who can appeal is nullified.

(3) In Order No. E-18560, July 5, 1962, the Board ordered Southern to "bargain collectively in good faith with ALPA as required by Section 2, First, of the Railway Labor Act" (R. 2612) and in accordance with its opinion of that date. Section 2, First, of the Railway Labor Act (45 U.S.C. 152) provides:

> "It shall be the duty of all carriers . . . to make every reasonable effort to make *and maintain* [collective bargaining] agreements . . ." (emphasis supplied).

(4) Section 401(k)(4) of the Federal Aviation Act (49 U.S.C. 1371(k)(4)) imposes upon air carriers the continuing obligation to bargain with their employees and requires continuing compliance as a condition for retention of the air carrier's certificate. Cf. *Conley* v. *Gibson*, 355 U.S. 41, 46 (1957), where this Court held that the bargaining duties of employee representatives under the Railway Labor Act continue after a collective agreement is reached. Thus it is Southern's duty, as required by the Board and by statute, to bargain collectively with ALPA and to make *and maintain* its collective bargaining agreements, including the provisions which the Board said must be incorporated in the back-to-work agreement, subject to the powerful sanction of loss of its certificate under § 401(g) of the Federal Aviation Act. (49 U.S.C. 1371(g)).

(5) The Board's order also provided that it retained jurisdiction "until further notice for the purpose of assuring compliance by Southern Airways, Inc. with this order" (R. 2612). No such notice has ever been issued, and the Board has never found that its orders have been complied with. If, for instance, Southern were now to violate the agreement, the Board might well hold it had violated the orders. The Board might then impose the sanction of suspension which it had expressly withheld "pending further developments" (R. 2587).

(6) Southern and ALPA themselves recognized the continuing jurisdiction of the Board. Paragraphs 12 and 15 of their back-to-work agreement provide:

> 12. "This Memorandum of Agreement shall continue to be effective until all pilots listed on Attachment "A" are fully restored to active flying status or eighteen (18) months from the effective date hereof, whichever shall last occur; except that the provisions of paragraphs 1.C, 2.A, 2.B[2] are to be continued and shall not be subject to termination at any time." (R. 2763)
>
> 15. "The parties shall from time to time report to the Civil Aeronautics Board concerning the effectuation of the orders of such Board and of the foregoing Agreement." (R. 2763)

b. ***The decision below is in conflict with decisions of this Court and of United States Courts of Appeals and should be reversed by this Court.***

(1) In *J. I. Case Co.* v. *N.L.R.B.*, 321 U.S. 332 (1944), the Labor Board sought enforcement of an order directed

---

[2] 1C provides for no discrimination by Southern against pilots because of their status as strikers (R. 2756). 2A provides for superseniority of the returning strikers over petitioners (the replacement pilots) (R. 2758). 2B provides for accrual of seniority of the striking pilots and fulfilling of probationary status during the strike (R. 2758).

by it to an employer to bargain upon request and to cease giving effect to conflicting individual contracts with its employees. While lower court proceedings were pending, the parties negotiated a collective agreement and the individual contracts expired. The Court considered the question of mootness and concluded that the case was not moot "in view of the continuing character of the obligation imposed by the order."

(2) The decision appealed from conflicts with the decision of this Court in *N.L.R.B.* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261 (1958), where it was held that an order of the Labor Board lawful when made does not become moot because it is obeyed or because changing circumstances indicate that the need for it may be less than when made

(3) In *N.L.R.B.* v. *United Brotherhood of Carpenters, etc.*, 184 F. 2d 60 (CA 10th, 1950, cert. den. 341 U.S. 947, 1951) where a secondary boycott was involved, a cease and desist order was issued. Subsequently, a collective bargaining agreement was entered into, the pending strike was settled and pickets were withdrawn. The Court of Appeals held that such an order, lawful when issued, does not become moot merely because changed circumstances indicate a diminished need therefor, and that the discontinuance or abandonment of an unfair labor practice after the issuance of such an order does not deprive the Board of its right to secure an order of enforcement from the cognizant Court of Appeals.

(4) The decision below conflicts with the decision of the Court of Appeals for the Sixth Circuit in *N.L.R.B.* v. *Oertel Brewing Company*, 197 F. 2d 59 (1952). That case involved discharge of employees in one union. After charges of unfair labor practices were filed, a new bargaining agreement was entered into. Jobs which constituted the matter in issue were eliminated from the provisions of the new agreement. Although the court rec-

ognized that the company had abandoned the forbidden practice and that the controversy could not arise again it nevertheless held that the issue was not moot. See also the following cases where it was held that abandonment of a practice does not render a matter moot; *N.L.R.B.* v. *F. H. McGraw & Co.*, 206 F. 2d 635 (CA 6th, 1953); *N.L.R.B.* v. *Denver Building and Construction Trades Council*, 192 F. 2d 577 (CA 10th, 1951); *N.L.R.B.* v. *United Brotherhood of Carpenters, etc.*, 181 F. 2d 126 (CA 6th, 1950).

c. This matter involves important questions in the application and enforcement of national labor laws within the air transportation industry which should be resolved on their merits.

As noted by the Court below, "This is the first case to reach the courts in which the Civil Aeronautics Board has purported to pass on labor disputes." 323 F. 2d at p. 289. The Board was then 24 years old. This unique interpretation of the Federal Aviation Act of 1958 seriously affects enforcement of the Railway Labor Act in air transportation. Until now, enforcement of the Railway Labor Act has been in the courts.

2. The Board did not have jurisdiction to entertain the complaint or to determine that the air carrier had failed to bargain collectively and so had violated the Railway Labor Act.

In determining that it had jurisdiction in this case, the Board relied primarily on Section 401(k)(4) of the Federal Aviation Act of 1958, which provides:

> "It shall be a condition upon the holding of a certificate by any carrier that such carrier shall comply with Title II of the Railway Labor Act, as amended." (49 U.S.C. 1371(k)(4)).

The Board reasoned that since it is the agency which certificates air carriers (Section 401(a) of the Act, 49 U.S.C. 1371(a)), it necessarily has the authority to determine whether a carrier is in compliance with the Railway Labor Act. It recognized, however, that "the exact role the Board is to play in the enforcement of obligations placed on air carriers by the Railway Labor Act is unsettled." It noted that even if it had authority to determine unfair labor practice charges against a carrier, it had no such authority with respect to a union (R. 2586).

The Board observed that "the legislative history of Section 401(k)(4) is of little or no help." (R. 2564) When the labor provisions of the predecessor statute, the Civil Aeronautics Act of 1938, were under consideration, however, the Congressional committees having charge of that legislation considered and then discarded a so-called "penalty" provision, which would have specifically empowered the Board to determine violations of the Railway Labor Act and, upon such determination, mandatorily to suspend an air carrier's certificate for such a violation (See Senate Commerce Committee Hearings on S. 3659, 75th Congress, pp. 64-67; House Commerce Committee Hearings on H.R. 9738, 75th Congress, pp. 213, 235-240, 366-367; House (Conference) Report No. 2635, 75th Congress, p. 69). Instead, the Committees retained a so-called "compliance" provision and a general power of suspension provision, which became Sections 401(l)(4) and 401(h) of the Civil Aeronautics Act of 1938 and later Sections 401(k)(4) and 401(g) of the Federal Aviation Act of 1958 (49 U.S.C. 1371(k)(4) and 1371(g)). In the light of this, it seems improbable that Congress, in including these two provisions, intended to grant to the Board the Board powers over labor relations which the Board has exercised in this case.

The Railway Labor Act was enacted in 1926 (45 U.S.C. 151, et. seq.) to provide ways and means for peaceful settlement of disputes involving rail carriers and their

employees (Section 2, First). It created certain specific rights for employees, including the right to designate representatives (Section 2, Third), the right to organize, and to bargain collectively (Section 2, Fourth), and the right to be free from agreements not to join labor organizations (Section 2, Fifth). It placed in the National Mediation Board certain powers and functions of mediation and arbitration and it authorized the creation of an Emergency Board to investigate and report to the President on any dispute not resolved by mediation or arbitration under the Act when in the judgment of the Board and the President, the national interest might require such action. But the Act gave no authority to any regulatory agency to enforce these provisions or to impose sanctions or remedial measures.

The question of the enforceability of rights created under the Railway Labor Act was resolved in *Texas & N.O.R. Co. v. Brotherhood*, 281 U.S. 548 (1930) where such rights were held to be enforceable in the courts:

> "It is thus apparent that Congress, in the legislation of 1926, while elaborating a plan for amicable adjustments and voluntary arbitration of disputes between common carriers and their employees, thought it necessary to impose, and did impose, certain definite obligations enforceable by judicial proceedings." (Page 567)

> "If Congress intended that the prohibition, as thus construed, should be enforced, the courts would encounter no difficulty in fulfilling its purpose, as the present suit demonstrates." (Page 568)

> "As the prohibition was appropriate to the aim of Congress, and is capable of enforcement, the conclusion must be that enforcement was contemplated." (Page 569)

This question was again before the Court in *Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515

(1937) where the principles of *Texas* v. *Brotherhood* were affirmed and it was further said:

> "It is, we think, not open to doubt that Congress intended that this requirement be mandatory upon the railroad employer, and that its command, in a proper case, be enforced by the courts." [Page 545]

Subsequent decisions are to the same effect.[1]

Enactment of Title II of the Railway Labor Act in 1936 extended to air carriers and their employees all of the provisions of the 1926 Act except those contained in Section 3, which established and set forth the duties and functions of the National Railway Adjustment Board (45 U.S.C. 181, et seq.). By this amendment the principle of court enforcement already established became applicable to air carrier employees and they have looked to the courts for enforcement of their rights under the Railway Labor Act since that time.[2]

The Board's lack of expertise in labor relations matters is a factor which militates against its asserted jurisdiction in this case. As observed in *Outland* v. *CAB*, 284 F. 2d 224 (C.A. D.C. 1960), "the Board's experience

---

[1] *Steele* v. *L. and N. R. Co.*, 323 U.S. 192 (1944); *Tunstall* v. *Brotherhood*, 323 U.S. 210 (1944); *Brotherhood* v. *Howard*, 343 U.S. 763 (1952); *Conley* v. *Gibson*, 355 U.S. 41 (1957); *Elgin J. & E. R.R. Co.* v. *Burley*, 325 U.S. 711 (1945), rehearing 327 U.S. 661; *Washington Terminal Co.* v. *Boswell*, 124 F. 2d 235 (CA D.C. 1941); *Edwards* v. *Capital Airlines*, 176 F. 2d 755 (CA D.C. 1949).

[2] *Transcontinental Air Lines* v. *Koppal*, 345 U.S. 653 (1953); *Ferris* v. *Alaska Air Lines*, 113 F. Supp. 907 (D.C.W.D. Wash., 1953); *Sigfred* v. *Pan American Air Lines*, 122 F. Supp. 881 (D.C.S.D. Fla., 1954); *Brady* v. *Trans World Airlines*, 156 F. Supp. 82 (D.C.D. Del., 1957); *American Air Lines* v. *Air Line Pilots Ass'n.*, 169 F. Supp. 177 (D.C.S.D. N.Y., 1958); *Bullock* v. *Capital Air Lines*, 176 F. Supp. 449 (D.C.E.D. N.Y., 1959); *Northwest Air Lines* v. *Machinists*, 178 F. Supp. 853 (D.C.D. Minn., 1959); *Pan American World Airways* v. *T.W.U.*, 51 L.R.R.M. 2170 (D.C.E.D. N.Y., 1962, unreported otherwise).

and expertise is with transportation, not labor relations." In that case the court below upheld the Board in declining to resolve a labor dispute relative to integration of conflicting pilot seniority lists.

Only recently, in *Burlington Truck Lines* v. *U. S.*, 371 U.S. 156, (1962), this Court observed that "Expert discretion is the life blood of the administrative process" and that expertise is "the strength of modern government." In that case the Court reversed an order of the Interstate Commerce Commission for improperly injecting itself into labor relations matters beyond its competence.

Petitioners here contend that the Civil Aeronautics Board has also attempted to deal with a labor dispute in excess of its jurisdiction and beyond its competence. Instead of undertaking to determine whether Southern should retain its air carrier's certificate, a matter within its jurisdiction under Section 401(k)(4) of the Act, the Board sought to resolve a prolonged labor dispute by laying down detailed "guidelines" for the disputing parties. The Board did this despite its knowledge, as disclosed in its opinion, that a Federal court had reached an opposite determination on the same basic issues, between the same parties, in a parallel case (*ALPA* v. *Southern*, 49 L.R.R.M. 3145, U.S.D.C., M.D., Tenn. 1962, unreported otherwise; see Board Decision herein, July 5, 1962, R. 2565; minority opinion, R. 2593). In that case, the Court found no failure to bargain in good faith on the part of Southern. If the Board had desired to limit its concern to the enforcement of Section 401(k)(4), it should have relied upon the findings and conclusions of the Federal court, with the result that determination of the labor dispute would have been resolved by the agency to which this responsibility had been entrusted, i.e., the federal judiciary.

An alternative forum, still not the CAB, might be the Emergency Board established by Section 10 of the Railway Labor Act, 49 U.S.C. 160. There has recently been publicity about the de-

If, however, the Board's determination of jurisdiction in this case is upheld, it will posses substantially the same broad authority in the labor field with respect to air carriers as is possessed by the National Labor Relations Board with respect to other employers (see 61 Stat. 141; 29 U.S.C. 150 et seq.).

3. The Board did not have authority under the guise of guidelines, to dictate terms of a collective agreement.

The Board's Opinion and Order (No. E-18560) of July 5, 1960 and its Order (No. E-18737) of August 27, 1962 told the parties what the agreement must provide with respect to seniority and job retention rights of the pilot groups. In its opinion the Board said:

> "Under these principles, Southern would be permitted to retain as permanent employees those replacement pilots hired prior to July 12, 1960; strikers replaced on or after July 12, 1960, would be entitled to reinstatement if they desire and so request, and if necessary Southern would be required to furlough or dismiss replacement pilots hired on or after July 12, 1960, to make room for them; and the seniority and other rights and privileges of the strikers should continue unimpaired. Further, strikers not reinstated because they were replaced prior to July 12, 1960 and replacement employees furloughed to make room for reinstated strikers should, if they request, be placed by Southern on a preferential hiring list for the filling of future vacancies in the order of their seniority. Southern would be permitted to discipline its employees as it sees fit, but any such action would be subject to statutory grievance procedures. In providing these guidelines we do not intend to preclude the parties from reach-

---

cision of an emergency board established for the Florida East Coast Railway strike. Set, for instance, 54 L.R.R. 435, December 30, 1963. The services of an Emergency Board in the instant case were never invoked.

ing an agreement which may differ therefrom. On the other hand, any substantial and unjustifiable deviation from these guidelines will, if persisted in, be taken into consideration in determining whether the requirement of good faith bargaining has been met." (R. 2589).

In its "finding" No. 7 (R. 2591), the Board said:

> "That Southern should be ordered to comply forthwith with its obligations under the Railway Labor Act to bargain in good faith with ALPA, and compliance with such order should be achieved by Southern within a period of thirty (30) days after issuance thereof, failing which, Southern's authority to engage in air transportation would be subject to suspension or revocation pursuant to Section 401(g) of the Federal Aviation Act."

And then in its order of July 5, 1962 (R. 2612), the Board ordered that:

> "1. Southern Airways, Inc., shall within thirty (30) days after issuance of this order bargain collectively in good faith with ALPA as required by Section 2, First, of the Railway Labor Act and in accordance with the attached opinion;
>
> "2. The Board retain jurisdiction over this proceeding until further notice for the purpose of assuring compliance by Southern Airways, Inc., with this order."

In its order of August 27, 1962, (R. 2678), the Board was even more explicit as to what should be incorporated in a collective agreement. At R. 2679, the order states:

> "Upon consideration of Southern's petition, including the cases cited therein, the Board has determined that under its decision of July 5, 1962, Order E-18560, all strikers reinstated by Southern upon settlement of the strike, whether such reinstated pilots were captains or co-pilots or probationary

pilots at the time of the strike, are entitled to their respective places on the seniority list, ahead of all the replacement pilots retained by Southern."

Thus, the Board orders put Southern under compulsion either to accept the Board "guidelines" or lose its operating authority. The Board orders left Southern no room for bargaining. Its "guidelines" were actually directions. Such directions are contrary to the policies adopted by the Congress.

Neither an administrative agency nor a court may properly dictate the substantive terms of a collective agreement. As was said in *Terminal Railroad Assn.* v. *Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1943):

> "The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed by those Acts is not primarily in the working conditions as such. So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions."

See also *N.L.R.B.* v. *American National Insurance Co.*, 343 U.S. 395 (1952) and *N.L.R.B.* v. *Insurance Agents International Union*, 361 U.S. 477 (1960).

1. ALPA's failure to represent the individual petitioners, or to arrange for their appearance as parties, invalidates the proceedings.

ALPA had been designated and authorized by the National Mediation Board, under the Railway Labor Act, to act as the collective bargaining representative of the pilot employees in the service of Southern (R. 2, 2613).

Section 2 of the Railway Labor Act requires ALPA to act on behalf of all the pilot employees, those who are its members and those who are nonmembers. *Steele* v. *L. & N.R. Co.*, 323 U.S. 192 (1944); *Tunstall* v. *Brotherhood*, 323 U.S. 210 (1944); *Brotherhood* v. *Howard*, 343 U.S. 768 (1952); *Ford Motor Company* v. *Huffman*, 345 U.S. 330 (1953); *Conley* v. *Gibson*, 355 U.S. 41 (1957); *Mount* v. *Locomotive Engineers*, 226 F. 2d 605 (CA 6th, 1955, cert. den. 350 U.S. 967, 1956); *Cunningham* v. *Erie R.R.*, 266 F. 2d 411 (CA 2d, 1959).

ALPA not only failed to represent the petitioners before the CAB, but it consistently took an adverse position (see, for instance, R. 2679). It may have felt that its interest conflicted with theirs, as indeed it did, but in that case the least it should have done was see that petitioners were brought into the proceedings and into the negotiations. It did neither.

In this connection, Section 1009 of the Federal Aviation Act provides for the inclusion or intervention as parties, of "all persons interested in or affected by the matter under consideration." Service of process may be made early by mail (Section 1005(c)), but none was made in this case.

5. Petitioners were indispensable parties and the failure of the Board to bring them in as parties invalidates the proceedings.

When the ALPA pilots struck on June 5, 1960, Southern immediately began to recruit replacement pilots (R. 2679). By July 12, 1960 about 52 such replacements had been hired (id.), and by July 27-28 there were about 100 (R. 2562, 2602). The replacement pilots were still flying for Southern at the time of the CAB order on July 5, 1962.

The employment contracts of the replacement pilots were largely oral (R. 761-4); they were contracts nonetheless.

No petitioner was made a party to the proceeding before the Board, and none was served, although all were within the jurisdiction of the Board. None was notified of the hearing (see Notice of Hearing, R. 77, 81). None was called as a witness. Thus the rights of the petitioners to their jobs and to their seniority were adjudicated in their absence. Even so, the Board split 3-2 on the issue whether their employment was permanent (R. 2576, 2608).

"Indispensable parties" are "All whose interests will be affected by the decree, that is, all persons materially interested either legally or beneficially in the subject matter of the suit . . ." *Green* v. *Brophy*, 110 F. 2d 539 (CA D.C., 1940). In the *Green* case, which involved an attempt by the A.F. of L. to recover from the C.I.O. monies which a local union had paid to the C.I.O. but allegedly should have paid to the A.F. of L., the Court said that the relationship between the A.F. of L. and the local was an issue, and that therefore the local was an indispensable party which "must affirmatively be given an opportunity to assert its rights."

The *Green* case was followed in *Olson* v. *Miller*, 263 F. 2d 738 (CA D.C., 1959), and the two decisions point up the long-settled rule that persons with conflicting claims to a fund are indispensable parties to litigation involving that fund. *Williams* v. *Bankhead*, 86 U.S. 563 (1874); *U.S.* v. *Bank of New York & Trust Company*, 296 U.S. 463 (1936); *Brown* v. *Christman*, 126 F. 2d 625 (CA D.C. 1942). In the instant case, jobs, not a fund, are involved, but this is not a distinction.

In *Consolidated Edison Company* v. *N.L.R.B.*, 305 U.S. 197 (1938), the N.L.R.B., on charges filed by a C.I.O. affiliate, invalidated contracts between the company and certain A.F. of L. affiliates which were not parties to the proceeding before the Board. The A.F. of L. affiliates entered the case for the first time by petition to the Court of Appeals, just as the petitioners in

this case have done. This Court held that the contracts between the company and the A.F. of L. affiliates could not be invalidated in the absence of the affiliates. It said:

> "We think that the Brotherhood and its locals having valuable and beneficial interests in the contracts were entitled to notice and hearing before they could be set aside. . . . The rule, which was applied in the case cited to suits in equity, is not of a technical character but rests upon the plainest principle of justice, equally applicable here" (p. 233).

The Court distinguished the situation in the *Consolidated Edison* case from that in *N.L.R.B.* v. *Pennsylvania Greyhound Lines*, 303 U.S. 261 (1938), where the Board had invalidated a contract between the company and a company-dominated union which was not a party. The Court affirmed. The distinguishing rationale appears to be that a company-dominated union is simply an arm of the company, and is therefore a party to the proceeding through the company itself.

The instant case is analagous to *Consolidated Edison*, not to *Pennsylvania Greyhound*. The petitioners here had employment contracts with Southern. There is no finding that they were company-dominated. Petitioners had a right not to organize and therefore a right to make individual contracts. Had they been organized into a non-company-dominated union, that union would have been in the same position as the A.F. of L. affiliates in *Consolidated Edison*. That the petitioners were acting individually can make no difference.

The petitioners' arguments are particularly cogent with respect to the 52 replacement pilots who were hired prior to July 12, 1960.[*] Even the majority of the Board

---

[*] The majority of the Board was mistaken in connection with the date of July 12, 1960. As the minority pointed out, the date should have been July 28 (R. 2593; see also Opinion of Judge

held that the company committed no unfair labor practices prior to July 12. Under these circumstances, pilots hired prior to that date had to be parties to any proceeding which materially affected their rights.

6. The Board's findings that Southern failed to bargain in good faith are not supported by the record.

Two issues were dealt with by the Board in its findings with respect to Southern not having bargained in good faith: unreviewable discipline and seniority.

(1) *The finding as to unreviewable discipline.* There is conflicting evidence as to whether the company took an inflexible position on its power of unreviewable discipline or whether this was simply a bargaining position. The minority of the Board (R. 2601-2), the examiner who heard the evidence (R. 2246-51), and the United States District Court in Tennessee (Op., p. 34, see R. 2565, 2593) all found that the company's position was not inflexible, but, if we accept the majority's findings it still appears that the Company had abandoned its demand after the District Court's decision in *ALPA* v. *Southern*, supra, February 16, 1962, and thus the Board was not justified in placing its decision of July 25, 1962 on this ground.

(2) *The finding as to seniority.* Petitioners rest their argument that Southern rightfully demanded job protection for the replacement pilots on the decisions of this Court in *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938) and of the Courts of Appeals in *N.L.R.B.* v. *Potlatch Forests*, 189 F. 2d 82 (CA 9th, 1951), and *N.L.R.B.* v. *Lewin-Mathes Co.*, 285 F. 2d 871 (CA 7th, 1960). *Mackay* established the right of an employer to hire permanent replacements for economic strikers.

Miller, *ALPA* v. *Southern Airways*, CA No. 2982, D.C.M.D. Tennessee, p. 31). By July 28 a larger number of replacement pilots had been hired.

Erie Resistor Corp. v. *N.L.R.B.* 373 U.S. 221, decided by this Court May 13, 1963, did not overrule *Mackay;* further, the inducement offered by Erie Resistor Corporation to striker replacements and strikers who abandoned their strike involved a 20-year seniority credit, unlike the job offer made by Southern to its replacement pilots which did no more than promise permanency of employment within the rule of the *Mackay* case.

As the strike in this case was economic in its inception, Southern had the right, under the cited decisions, to employ replacement pilots on a permanent basis if necessary in order to carry on its business, and to reinstate strikers as needed, crediting seniority to replacements from their dates or hire and to strikers from their dates of reinstatement. Having the right so to conduct its business, Southern had the right to propose this in its bargaining negotiations. It follows that it cannot be charged with bad faith bargaining in doing so. Indeed, it had a duty as well as a right to inform both the replacements and the strikers of its intentions in this regard.

Southern's employment practices are justified under the foregoing decisions not as a form of "superseniority," but as normal incidents of hiring and reinstating employees under the circumstances of an economic strike.

The Board majority indicated it was not satisfied with the showing in the record as to the need for Southern to give replacement pilots employment on an indefinite ("permanent") hire basis. But this incompleteness is the result of the Board's failure to bring petitioners in as parties, for which petitioners, too, complain (p. 17 above).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

PHILIP F. HERRICK
NICHOLAS E. ALLEN
1001 15th Street, N.W.
Washington, D.C. 20005
Attorneys for Petitioners

APPENDIX A

THE FEDERAL AVIATION ACT OF 1958

* * * *

TITLE IV—AIR CARIRER ECONOMIC REGULATION

Certificate of Public Convenience and Necessity

Certificate Required

Section 401 (a). No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation. [49 U.S. Code 1371 (a)].

* * * *

Authority to Modify, Suspend, or Revoke

Section 401 (g). The Board upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided*, That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of the certificate. [49 U.S. Code 1371 (g).]

* * * *

Compliance With Labor Legislation

Section 401 (k) (4). It shall be a condition upon the holding of a certificate by any air carrier that such carrier shall comply with title II of the Railway Labor Act, as amended. [49 U.S. Code 1371 (k) (4).]

* * * * * *

Complaints to and Investigations by the Administrator and the Board

* * * * *

Entry of Orders for Compliance With Act

Section 1002 (c). If the Administrator or the Board finds, after notice and hearing, in any investigation instituted upon complaint or upon their own initiative, with respect to matters within their jurisdiction, that any person has failed to comply with any provision of this Act or any requirement established pursuant thereto, the Administrator or the Board shall issue an appropriate order to compel such person to comply therewith. [49 U.S. Code 1482 (c).]

* * * * *

Orders, Notices, and Service

* * * * *

Other Methods of Service

Section 1005 (c). Service of notices, processes, orders, rules, and regulations upon any person may be made by personal service, or upon an agent designated in writing for the purpose, or by registered or certified mail addressed to such person or agent. Whenever service is made by registered or certified mail, the date of mailing shall be considered as the time when service is made. [49 U.S. Code 1485 (c).]

* * * * *

Judicial Review of Orders

Orders of Board and Administrator Subject to Review

Section 1006 (a). Any order, affirmative or negative, issued by the Board or Administrator under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore. [49 U.S. Code 1486(a).]

* * * *

Findings of Fact Conclusive

Section 1006 (e). The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so. [49 U.S. Code 1486(e).]

Certification or Certiorari

Section 1006 (f). The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board or Administrator shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in section 1254 of title 28, United States Code. [49 U.S. Code 1486(f).]

* * * *

Joinder of Parties

Section 1009. In any proceeding for the enforcement of the provisions of this Act, or any rule, regulation, requirement, or order thereunder, or any term, condition, or limitation of any certificate or permit, whether such proceedings be instituted before the Board or be begun originally in any court of the United States, it shall be lawful to include as parties, or to permit the intervention of, all persons interested in or affected by the matter under consideration; and inquiries, investigations, orders, and decrees may be made with reference to all such parties in the same manner, to the same extent, and subject to the same provisions of law as they may be made with respect to the persons primarily concerned. [49 U.S. Code 1489.]

RAILWAY LABOR ACT
TITLE I

* * * *

General Purposes

Section 2. The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions. [45 U.S.C. 151a.]

General Duties

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representatives of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, or-

ganize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions; Provided, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

* * * * *

Tenth. The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000, nor more than $20,000, or imprisonment for not more than six months, or both fine

and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; Provided, That nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent * * * [45 U.S.C. 152.]

* * * * *

Functions of Mediation Board

Section 5. First. The parties or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

Second. In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this chapter, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days. * * * [45 U.S.C. 155.]

Arbitration

Section 7. First. Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in section 151-156 of this title such controversy may, by

agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons; Provided, however, That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this chapter or otherwise. * * * [45 U.S.C. 157.]

* * * * *

Emergency Board

Section 10. If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this chapter and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable; Provided, however, That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

* * * * *

After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose. [45 U.S.C. 160.]

* * * *

TITLE II

* * * * * *

Section 201. All of the provisions of title I of this Act, except the provisions of section 3 thereof, are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service. [45 U.S.C. 181.]

Section 202. The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of title I of this Act, except section 3 thereof, shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of "carrier" and "employee", respectively, in section 151 of this title. [45 U.S.C. 182.]

Section 203. The parties or either party to a dispute between an employee or a group of employees and a carrier or carriers by air may invoke the services of the National Mediation Board and the jurisdiction of said Mediation Board is extended to any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to an adjustment board, as hereinafter provided, and not adjusted in conference between the parties, or where conferences are refused.

The National Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

The services of the Mediation Board may be invoked in a case under this title in the same manner and to the same extent as are the disputes covered by section 5 of title I of this Act. [45 U.S.C. 183.]

Section 204. The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 3, Title I, of this Act.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group or carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in this Act shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of this title, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction. [45 U.S.C. 184.]

APPENDIX B

(323 F.2d 288)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,362

SOUTHERN PILOTS ASSOCIATION,
LEWIS H. HOLMAN, ET AL., PETITIONERS

v.

CIVIL AERONAUTICS BOARD, RESPONDENT
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
INTERVENOR

Petition for Review of Orders of the
Civil Aeronautics Board

Decided June 13, 1963

Mr. Nicholas E. Allen, with whom *Mr. Philip F. Herrick* was on the brief, for petitioners. *Mr. John S. Yodice* also entered an appearance for petitioners.

Mr. O. D. Ozment, Associate General Counsel, Litigation and Legislation, Civil Aeronautics Board, with whom *Messrs. John H. Wanner*, General Counsel, and *Joseph B. Goldman*, Deputy General Counsel, Civil Aeronautics Board, and *Lionel Kestenbaum*, Attorney, Department of Justice, were on the brief, for respondent.

Mr. James L. Highsaw, Jr. for intervenor.

Before BAZELON, *Chief Judge*, PRETTYMAN, *Senior Circuit Judge*, and WRIGHT, *Circuit Judge*.

WRIGHT, *Circuit Judge*: This case involves a petition for review [1] of a rather unusual [2] order [3] of the Civil Aeronautics Board which finds Southern Airways, Inc. guilty of unfair labor practices under the Railway Labor Act. Review is also sought of the denial by the Board of petitioners' application to intervene in the Board proceeding and for rehearing.[4] We dismiss the petition for review as moot.

On July 30, 1959, the Air Line Pilots Association (ALPA), the certified bargaining agent for the pilot employees of Southern Airways, notified the airline that it desired certain changes in the existing collective bargaining agreement. After extended negotiations failed to bring agreement, ALPA called a strike on June 5, 1960. The airline, while continuing negotiations, commenced hiring replacement pilots and gradually resumed full operations. On July 12, 1960, the airline made two demands at the bargaining conference with ALPA: (1) the right to discipline returning strikers for misconduct during the strike without recourse to statutory grievance procedures, and (2) super-seniority for the replacement pilots.

Based on these demands, ALPA filed what was in essence an unfair labor practice charge against the airline with the Board, relying upon Section 401(k)(4) [5] of the Federal Aviation Act. Overruling the airline's challenge to its jurisdiction, the Board found that both airline de-

---

[1] Pursuant to 72 Stat. 795, 49 U.S.C. § 1486.

[2] This is the first case to reach the courts in which the Civil Aeronautics Board has purported to pass on labor disputes.

[3] *Air Line Pilots Association* v. *Southern Airways, Inc.*, Order No. E-18560, Docket No. 11654 (July 5, 1962), reported in part, 1A Av.L.Rep. ¶ 21,297, clarified Order No. E-18727 (Aug. 27, 1962), 1A Av.L.Rep. ¶ 21,813.

[4] *Air Line Pilots Association* v. *Southern Airways, Inc.*, Order No. E-19162, Docket No. 11654 (Jan. 3, 1963).

[5] 72 Stat. 757, as amended, 49 U.S.C. § 1371(k)(4).

mands constituted refusals to bargain in good faith, and directed the airline to commence good faith bargaining within 30 days. The Board also laid down certain "guidelines" for bargaining, stating that "the seniority and other rights and privileges of the strikers should continue unimpaired." Later, in response to a request for clarification, it stated "all strikers reinstated by [the airline] upon settlement of the strike * * * are entitled to their respective places on the seniority list, ahead of all the replacement pilots retained by [the airline]." Both ALPA and the airline filed timely petitions for review of the Board's order in the Fifth Circuit Court of Appeals and then resumed negotiations.[6] On September 21, 1962, they arrived at an agreement which, *inter alia*, gave the striking pilots seniority over all the replacements. As part of the agreement, the petitions for review were withdrawn.

Upon execution of the contract, the replacement pilots, petitioners here, realizing that they had been left out in the cold, hurriedly formed their own association and commenced a barrage of challenges.[7] On October 26, 1962, they filed a petition for review of the Board order in this court,[8] and on October 29 they petitioned the Board to re-

---

[6] Petitioners were never parties, either before the Board or before the Fifth Circuit Court of Appeals, in this administrative proceeding.

[7] In addition to proceedings initiated in this court, petitioners, on November 2, 1962, filed suit in the Northern District of Georgia against the airline and ALPA to enjoin operation of the new contract. On November 9, 1962, the suit in the Northern District of Georgia was dismissed on the ground that it constituted an attempt collaterally to review the Board order, a function reserved to the several Courts of Appeals. *Holman* v. *Southern Airways, Inc.*, N.D. Ga., 210 F.Supp. 407 (1962), appeal pending. On January 23, 1963, the Fifth Circuit Court of Appeals ordered appeal from the decree of the District Court held in abeyance pending disposition of the instant petition. *Holman* v. *Southern Airways, Inc.*, Docket No. 20181 (Jan. 23, 1963).

[8] ALPA intervened in this proceeding. Southern Airways is not represented in any way.

open the proceedings, permitting them to intervene. On January 3, 1963, the petition to intervene and for a rehearing was denied by the Board.

Petitioners allege that the Board order stands in the way of their attempt, in other courts, to enjoin operation of the bargaining agreement on the ground that the union, with the concurrence of the airline, discriminated against the replacement pilots. But the proceeding now before us is solely for review of the Board's order and a decision by this court on the validity of that order would have no effect because the rights and duties of the parties are now controlled by the bargaining agreement subsequently entered into. The Board, as it pointed out in its opinion denying petitioners' application for rehearing and intervention, has no jurisdiction to pass upon designations of bargaining agents or charges of discrimination in the representation function.[*] Petitioners do not suggest otherwise.

Petition dismissed.

---

[*] The Board stated: "* * * [T]he Board does not consider that it can look behind the National Mediation Board's designation of ALPA as the collective bargaining agent for [the airline's] pilots or inquire into whether the union had discriminated against petitioners in its representation functions." *Air Line Pilots Association* v. *Southern Airways, Inc.*, *supra*, Note 4.

Office-Supreme Court, U.S.
FILED
FEB 8 1964
JOHN F. DAVIS, CLERK

No. 743

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

SOUTHERN PILOTS ASSOCIATION, ET AL., *Petitioners*

v.

CIVIL AERONAUTICS BOARD, *Respondent*

and

AIR LINE PILOTS ASSOCIATION, *Intervenor*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF INTERVENOR AIR LINES PILOTS ASSOCIATION, INTERNATIONAL IN OPPOSITION

EDWARD J. HICKEY, JR.
JAMES L. HIGHSAW, JR.
620 Tower Building
Washington 5, D. C.
Counsel for Air Line Pilots Association, International

Of Counsel:

HENRY WEISS
HERBERT A. LEVY
605 Third Avenue
New York, N. Y. 10016

MULHOLLAND, HICKEY & LYMAN
620 Tower Building
Washington 5, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Statutes and Regulations Involved	3
Statement	3
Argument	14
1. The decision below does not conflict with previous decisions of this Court	15
2. The decision of the Court of Appeals does not conflict with decisions of other circuits	16
3. The petition does not present an important Federal question	16
4. The Court of Appeals did not err	17
5. The Board orders sought to be reviewed are valid and proper	18
a. The Board possessed jurisdiction to issue the orders in question	18
b. The effect of the Board orders	19
c. The Board was not required to make the petitioners parties to the proceeding before it	20
d. The Board orders are supported by the record	21
e. ALPA did not violate any duty owed petitioners	22
Conclusion	25
Appendix A	26
Appendix B	27

INDEX TO CITATIONS

Cases:	Page
ALPA v. Southern Airways, Inc., 49 LRRM 3145 (1962), (not otherwise reported)	17
Airlines Negotiating Conference, 8 C.A.B. 354 (1947)	19
Ballas Egg Products, Inc. v. NLRB, 283 F. 2d 871 (6th Cir., 1960)	22
Erie Resistor Corp. v. NLRB, 373 U.S. 221 (1963)	21, 22
Federal Trade Commission v. Minneapolis-Honeywell Regulator Company, 344 U.S. 206	2
Ford Motor Co. v. Huffman, 345 U.S. 330 (1953)	24
Grand Lodge v. Girard Lodge, 384 Pa. 248, 120 A. 2d 523 (1956)	24
Gypsy Oil Company v. Bennett, 275 U.S. 408	2
Holman, et al. v. Southern Airways and Air Line Pilots Association, 210 F. Supp. 407 (U.S.D.C. N.D. Ga., 1962)	13, 14, 17
Inland Steel Company v. NLRB, 170 F.2d 247, *cert. den.* 336 U.S. 960 (1949)	24
NLRB v. California Date Growers Association, 259 F. 2d 587 (9th Cir., 1958)	22
Olin Mathieson Chemical Corp. v. NLRB, 232 F. 2d 158 (4th Cir., 1956), aff'd 352 U.S. 1020 (1957)	22
Railroad Trainmen v. Georgia Railway, 305 F. 2d 605 (5th Cir., 1962)	21
Shenandoah Dives Mining Co., 34 NLRB 1153 (1941)	24
Six Carrier Mutual Aid Pact (Docket No. 9977, decided May 20, 1959)	19
Stewart Die Casting Corp. v. NLRB, 114 F. 2d 849 (7th Cir., 1940), *enforcing as modified*, 14 NLRB 872, *cert. den.* 312 U.S. 680 (1941)	22
Swarco, Inc. v. NLRB, 303 F. 2d 668 (6th Cir., 1962)	22
Washougal Woolen Mills, 23 NLRB 1 (1940)	24
Wilson & Co., Inc. v. NLRB, 120 F. 2d 913 (7th Cir., 1941)	24

Statutes and Regulations:	
Civil Aeronautics Board (49 U.S.C., Sections 401 et seq.)	19
Economic Regulations of Civil Aeronautics Board—Part 302, 17 F. R. 3020, et seq., as amended; 26 F. R. 8054; 27 F. R. 12545	6, 7, 8, 11, 27

Page

Federal Aviation Act of 1958 (49 U.S.C., Sections 1301 et seq.) 2, 3, 6, 19, 20
Federal Register Act (44 U.S.C., Section 308) 20, 27
Judicial Code (28 U.S.C.A., Section 1254(1)) 2
Railway Labor Act (45 U.S.C., Sections 151 et seq. 3, 4, 6, 17 18, 19, 21
U. S. Ct. of App., D. C. Cir., Rule 26, 28 U.S.C.A. 2

MISCELLANEOUS:

Federal Register, Vol. 25, October 28 and November 8, 1960, pages 10372 and 10667 ..... 7, 20
Hearings on H.R. 5234 before House Committee on Interstate and Foreign Commerce, March and April 1933, pages 202, 213, 370 19
Hearings on H.R. 9738 before House Committee on Interstate and Foreign Commerce, March and April 1938, pages 10, 213, 215, 237, 238 19
Hearings on S. 2, before Subcommittee of Senate Committee on Interstate Commerce, March and April 1938, pages 22, 24, 450, 585, 589, 590 19
Hearings on S. 3659 before Subcommittee of Senate Committee on Interstate Commerce on April 6 and 7, 1938, page 39 19
House Report No. 2065, 75th Cong., 2d Sess., page 69 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 743

SOUTHERN PILOTS ASSOCIATION, ET AL., *Petitioners*

v.

CIVIL AERONAUTICS BOARD, *Respondent*

and

AIR LINE PILOTS ASSOCIATION, *Intervenor*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF INTERVENOR AIR LINES PILOTS ASSOCIATION, INTERNATIONAL IN OPPOSITION

This brief is submitted to the Court by the Air Line Pilots Association, International (hereinafter called "ALPA"), the complainant in the administrative proceeding before the Civil Aeronautics Board from which this proceedings arises, and an intervenor in the case before the Court of Appeals.

OPINIONS BELOW

The opinion of the court below (App. B of Petition) is reported at 323 F. 2d 288. The orders of the Civil Aeronautics Board of which petitioners complain are not yet officially reported. They appear at pages 101, 206, and 223 of the printed joint appendix before the Court of Appeals.

JURISDICTION

The petition correctly states that the judgment of the Court of Appeals was entered on June 13, 1963, and that a petition for rehearing *en banc* was denied on October 14, 1963. However, the petition omits to mention that a petition for rehearing, filed by petitioners in accordance with Rule 26 of the Rules of the Court of Appeals, was denied by that Court on July 8, 1963 (Appendix A hereto), and that the petition for rehearing *en banc* which was denied on October 14, 1963, was an untimely filed second petition for rehearing.[1] The jurisdiction of this Court is invoked under 28 U.S.C., 1254(1) and 49 U.S.C., 1486(f).

[1] It is doubtful whether the petition for a writ of certiorari was timely filed pursuant to 28 U.S.C., Section 2101 (c), and Rule 21, paragraph 3 of the Rules of this Court. The 90-day period for filing the petition was commenced upon the Court of Appeals denial of petitioners' petition for rehearing on July 8, 1963 (Appendix A hereto). The motion for rehearing *en banc* was mailed to the Court of Appeals on July 5, 1963, and was rejected by the Clerk of the Court as untimely on July 8, 1963. Thereafter, on July 10, 1963, petitioners filed a motion for leave to file a motion for argument before the Court *en banc*, which was granted on July 16, 1963. The petition for rehearing *en banc* was filed on July 30, 1963, and was denied on October 14, 1963. Under these circumstances, it is doubtful that the second petition for rehearing *en banc* operated to extend the 90-day period for the filing of a petition for a writ of certiorari in this Court. Cf. *Gunsy Oil Company v. Bennett*, 275 U.S. 498. See *Federal Trade Commission v. Minneapolis-Honeywell Regulator Company*, 344 U.S. 206.

QUESTION PRESENTED

The single question presented to this Court is:

1. Did the Court of Appeals err when it dismissed the petition to review the orders of the Civil Aeronautics Board complained of by petitioners, where

(a) the Board's orders directed Southern Airways to bargain collectively in good faith with ALPA as required by Section 2, First, of the Railway Labor Act and in accordance with the Board's attached opinion; and

(b) petitioners did not seek to participate in the Board proceeding, although they had notice of the proceeding pending before the Board at least nine months prior to the issuance of the Board's order, and they raised no complaint concerning the Board's order until nearly four months after the order was issued, at a time when Southern and ALPA had reached agreement and stability of labor relations had been restored on that carrier.

STATUTES AND REGULATIONS INVOLVED

The relevant statutes and regulations involved are either quoted in Appendix A to the petition or in Appendix B to this brief.

STATEMENT

The administrative proceeding before the Civil Aeronautics Board, which resulted in the issuance of the Board orders complained of, arose from violations by Southern Airways of its obligations under the Railway Labor Act. The Civil Aeronautics Board undertook to enforce the performance of these obligations by Southern pursuant to its authority under Section 401 (k)(4) of the Federal Aviation Act of 1958.

On July 30, 1959, ALPA, the duly certified representative under the Railway Labor Act of Southern pilots and copilots, served a notice upon Southern in accordance with the requirements of Section 6 of the Railway Labor Act (45 U.S.C.A., Section 156) proposing certain changes in the collective bargaining agreement between the parties (R. 63).[2] When subsequent negotiations between the parties, including mediation by the National Mediation Board, produced an impasse, the National Mediation Board proffered arbitration. ALPA accepted this proffer of arbitration, but Southern rejected it. (R. 65, 66.) ALPA made a final effort to avoid a strike by advising Southern that it would submit the dispute for settlement to any kind of procedure—fact finding, arbitration, or anything else—for decision or recommendation. This offer was also rejected by the carrier. (R. 32.)

The carrier's refusal to arbitrate exhausted the procedures of the Railway Labor Act for settlement of the dispute. No procedure for resolving the impasse between the parties remained, and the pilots withdrew from the service of the carrier on June 5, 1960. (R. 24.)[3]

On July 11 and 12, 1960, the parties renewed negotiations under the auspices of the National Mediation Board. (R. 24.) While these meetings resulted in a resolution of all open economic issues between the

---

[2] Reference is to pages of the printed Joint Appendix before the Court of Appeals, nine copies of which have been filed with this Court.

[3] A Presidential Emergency fact finding Board, authorized by Section 10 of the Railway Labor Act (45 U.S.C.A., Section 160), was not appointed in the dispute.

parties, no contract was consummated since Southern interposed new conditions of reaching agreement with ALPA. It insisted that (1) the striking pilots forfeit their accumulated seniority and begin accumulating new seniority only from the date on which they returned to work; and (2) ALPA give Southern the right to take unilateral and unreviewable disciplinary action, including discharge, with respect to any pilot who, in Southern's view, had engaged in misconduct during the strike. (R. 67.)

Further negotiations began on July 27, 1960. In these meetings Board Member Edwards proposed a settlement of all issues between the parties raised by ALPA's notice and proposals of July 30, 1959. (R. 68, 69.) ALPA accepted Mr. Edwards' proposals on July 28, 1960. (R. 69.) Under the same date, Southern sent a letter to Mr. Edwards, which read in pertinent part as follows: (R. 70)

> "Please be advised that Southern Airways, Inc. accepts in principle your award, subject to execution of an agreement disposing of all issues between Southern and ALPA, except insofar as it pertains to duration. Southern's position is that the contract should continue in effect for two years from the date of execution.
>
> "Southern's acceptance of your advisory award is made without prejudice to its position concerning the following matters:
>
> (1) *Seniority*—Nearly 100 pilots have been employed since the strike began, and we require only about 40 additional pilots. We are willing to return to service as many of the strikers as our needs dictate, *but their seniority will date from the date on which they return to work.* (Emphasis supplied.)

(2) *Disciplinary Action*—Southern reserves the right to take disciplinary action, including ineligibility to return to service, in the case of pilots who have engaged in misconduct during the strike.

(3) *Parking Aircraft*—Any agreement finally executed would have to provide for pilots' parking and moving aircraft."

Thus, the only aspect of Mr. Edwards' proposal which was not fully resolved as of July 28, 1960 was the duration of the proposed agreement, i.e. whether it would be 18 months from July 1, 1960, or two years from the date of execution. The issues relating to duration of the agreement and the parking of aircraft (the latter not previously raised in negotiations) were relatively minor items, which, had they been raised independently by Southern and not as part of that carrier's seniority and discipline proposals, would not have produced an impasse in negotiations.

ALPA rejected the conditions imposed by Southern for settlement on the grounds that they were improper and illegal. (R. 41.)

On July 22, 1960, ALPA filed a complaint with the Civil Aeronautics Board pursuant to the provisions of Section 302.201 of the Board's rules of practice applicable to economic enforcement proceedings (Part 302 of the Board's Economic Regulations, 17 F. R. 3029, et seq., as amended; 25 F. R. 8054; 27 F. R. 12545). This complaint set forth the dispute between ALPA and Southern and alleged that Southern had violated and was continuing to violate the terms and conditions of its certificate, the provisions of the Federal Aviation Act, and the provisions of the Railway Labor Act in its conduct with respect to its dispute

with its pilots. The complaint requested the Board to direct Southern to comply with the provisions of the two statutes and, in the event of that carrier's failure to do so, to suspend or revoke all certificates authorizing Southern to engage in air transportation which had theretofore been issued to that carrier by the Board. (R. 6-12.)

After Southern filed an answer to ALPA's complaint (R. 13) and ALPA filed a reply (R. 14), the Director of the Board's Bureau of Enforcement on September 26, 1960, docketed a "Petition for Enforcement", which recited that "there are reasonable grounds to believe that certain provisions of the Federal Aviation Act of 1958, as amended, and requirements thereunder have been violated by Southern Airways, Inc., as alleged in the Complaint filed by the Air Line Pilots Association * * *." (R. 15.)

The proceeding thus instituted by the docketing of the petition for enforcement was publicly noticed for hearing to begin on November 15, 1960 (R. 16), through a notice signed by the Chief Examiner of the Board, dated October 25, 1960, and published in the Federal Register on October 28, 1960 (Vol. 25, page 10372). Subsequently, on November 8, 1960, a notice was issued by the Chief Examiner and filed in the Federal Register for that date (Vol. 25, page 10667) postponing the hearing in the proceeding from November 15, 1960, to December 1, 1960. (R. 17.)

Sections 302.10 and 302.15 of the Board's rules (Appendix B, p. 27) permitted intervention in the proceeding by (1) any person who had a statutory right to be made a party, and (2) any person whose intervention would be conducive to the ends of justice and would not

unduly impede the conduct of the Board's business. Rule 15 requires the filing of a petition to intervene within 15 days prior to the hearing. A petition to intervene which is not filed within the designated period may be entertained and granted by the Board upon a showing of good cause for the failure to make a timely filing. The petitioners did not file a petition to intervene in the proceeding prior to the beginning of the hearing therein.

The hearing in the proceeding began on December 1, 1960, and ended January 18, 1961. (R. 18, 62.) None of the petitioners appeared at the hearing or made any effort to intervene in the proceeding during this period. The parties appearing and participating in the hearing were ALPA, Southern Airways, and the Board's Bureau of Enforcement.

On September 23, 1961, the Hearing Examiner issued his Initial Decision. This decision concluded (a) that the Board had jurisdiction to determine the issues raised by the pleadings; (b) that the evidence of record failed to sustain the allegations of the complaint filed by ALPA; and (c) that the complaint should be dismissed. (R. 81-88.) This Initial Decision was given publicity in the newspapers and petitioners were aware of its issuance. (R. 214.) However, none of the petitioners made any effort at the time to intervene in the proceedings or to take any other action with respect thereto.

On October 9, 1961, ALPA filed exceptions with the Board to the Initial Decision. (R. 89.) The issues were orally argued before the Board on November 30, 1961. (R. 97.)

On May 25, 1962, the Board issued a press release announcing that it had reached a tentative decision in the proceeding. (R. 97.) This press release spelled out the Board's conclusions and stated that they would be embodied in a formal decision to be issued at a later date. Petitioners concede that they were aware of this press release at the time it was issued and the fact that their job rights were being considered in the Board proceeding. (R. 215.) Yet petitioners made no effort to intervene in the Board proceeding or to take any other action to protect their rights although a period of six weeks elapsed between the issuance of the press release and the serving of the formal Board opinion and order finalizing the tentative decision announced in the press release.

The Board order (No. E-18560) was dated July 5, 1962, and served on July 6, 1962. (R. 155.) In the opinion accompanying the order, the Board found as follows: (R. 133)

> "1. That, pursuant to the powers vested in its by Sections 204(a), 401(g), 401(k), and 1002(a), and (c) of the Federal Aviation Act of 1958, as amended, the Civil Aeronautics Board has jurisdiction to hear and determine the complaint filed by ALPA in this proceeding alleging violations of the Railway Labor Act and the Federal Aviation Act by Southern;
>
> "2. That Southern at all times from the inception of the negotiations on the new labor contract in July 1959, up to July 12, 1960, bargained in good faith with ALPA in compliance with Section 2, First, of the Railway Labor Act, as amended;
>
> "3. That on July 12, 1960, Southern and ALPA reached an impasse in their negotiations on request by ALPA and counter demands by Southern

with respect to (1) the reinstatement and seniority of the strikers in relation to the replacement employees, and (2) disciplinary action against striking employees;

"4. That Southern's demand relating to job retention and seniority is unlawful because it entails unreasonable and undue discrimination against the striking employees;

"5. That Southern's demand relating to non-reviewable disciplinary action is illegal *per se* because it would deprive employees of their statutory rights to have their grievances adjusted in accordance with procedures established pursuant to Section 204 of the Railway Labor Act and constitutes improper coercion and an unwarranted interference with protected rights of employees;

"6. That the continued insistence by Southern on its aforesaid demands as a condition for settlement of the strike and agreement on a new labor contract would constitute a failure by Southern to bargain in good faith with ALPA as required by Section 2, First of the Railway Labor Act;

"7. That Southern should be ordered to comply forthwith with its obligations under the Railway Labor Act to bargain in good faith with ALPA, and compliance with such order should be achieved by Southern within a period of thirty (30) days after issuance thereof, failing which, Southern's authority to engage in air transportation would be subject to suspension or revocation pursuant to Section 401(g) of the Federal Aviation Act;

"8. That Southern will not achieve compliance with such Board order unless in the settlement of the dispute and agreement on a new labor contract with ALPA it is guided by the principles set out above in our opinion;

"9. That should ALPA not observe the principles set out above or otherwise not cooperate

with Southern in the settlement of the dispute and agreement on a new labor contract, this be taken into account in considering any further action by the Board in this proceeding;

"10. That ALPA's contention that Southern has failed to comply with certain mandatory procedures of the Railway Labor Act with respect to the matters of seniority and discipline; be rejected; and

"11. That the various exceptions and other contentions of the parties, except to the extent indicated above, do not require any change in our findings and conclusions reached herein."

The Board's order contained the following directive: (R. 155)

"It Is Ordered That:

"1. Southern Airways, Inc., shall within thirty (30) days after issuance of this order bargain collectively in good faith with ALPA as required by Section 2, First, of the Railway Labor Act and in accordance with the attached opinion;

"2. The Board retains jurisdiction over this proceeding until further notice for the purpose of assuring compliance by Southern Airways, Inc., with this order."

Section 302.37 of the Board's rules (Appendix B p. 28) provides that any party to a proceeding may file a petition for reconsideration, rehearing, or re-argument of a final order issued by the Board within 20 days after service thereof. No petition for reconsideration of the Board's order of July 5, 1962, was filed with the Board.

On August 14, 1962, Southern Airways filed a document with the Board entitled "Petition for Directive

By Southern Airways, Inc." (R. 201.) This document recited that Southern Airways was in the process of complying with Board order No. E-18560, subject to judicial review of such order. Southern requested the Board to clarify its opinion and order in certain respects. On August 27, 1962, the Board issued Order No. E-18737. (R. 206.) That order provided the clarification requested by Southern, and concluded in its directory portion, (R. 210), that "Southern be guided in its future negotiations with ALPA, pursuant to Order E-18560, adopted July 5, 1962, by the determination stated above."

On September 21, 1962, ALPA and Southern Airways signed a memorandum agreement identified as a "Back to Work Agreement". (R. 219.) Section 2 of the agreement upon which petitioners' claims are focused, provides for the application of the principle of seniority based on date of hire uniformly to all pilots covered by the agreement, including both striking and replacement pilots. (R. 221.) By this time more than three months had elapsed since the Board had announced its proposed decision in this matter, by means of a press release of May 25, 1962, of which petitioners had actual notice. They had yet taken no action before the Board to assert any interest in this matter.

On October 26, 1962, the petitioners filed their petition in the Court of Appeals to review Board Orders No. E-18560, dated July 5, 1962, and No. E-18737, dated August 27, 1962, without previously raising any objection to or asserting any interest in those orders before the Board. Approximately five months had elapsed since May 25, 1962, the date of the press re-

leave by which, as petitioners concede, they first became aware of the Board's action.

Finally, on October 29, 1962, petitioners filed with the Board a petition (1) for leave to intervene in the proceeding in Docket No. 11654; (2) for a rehearing in such proceeding; (3) for reconsideration of Board Orders No. E-18560 and No. E-18737; and (4) for a suspension of such orders. (R. 211.)

That petition was dismissed by Board Order No. E-19162, dated January 3, 1963. (R. 224-227.) The Board, in its order of dismissal, noted that the petition was untimely and need not be entertained, but it nonetheless accepted the petition for filing and considered it on its merits. The order found that Southern and ALPA had resumed negotiations and concluded an agreement on September 21, 1962, thus finally resolving their dispute, and that there was no showing of a lack of good faith bargaining in these negotiations. Upon petitioners' motion, Order No. E-19162 was added to the subject matter of the petition for review, by order of the Court of Appeals dated February 7, 1963. (R. 5).

On November 13, 1962, petitioners filed a motion with the Court of Appeals for an order staying Board orders No. E-18560 and No. E-18737 and staying the effectiveness of the agreement of September 21, 1962, between ALPA and Southern Airways. That motion was denied by the *per curiam* order of the Court of Appeals of November 21, 1962.

Similar applications for stays by petitioners were denied by the United States District Court for the Northern District of Georgia in the case of *Holman, et al.* v. *Southern Airways and Air Line Pilots Associ-*

ation, 210 F. Supp. 407 (1962) (an action in which petitioners unsuccessfully sought to enjoin the implementation of the Back to Work agreement) and by the Court of Appeals for the Fifth Circuit on appeal from the decision in the *Holman* action while the petition for review before the Court of Appeals in the District of Columbia was pending.

On June 13, 1963, the Court of Appeals issued the order now sought to be reviewed, dismissing the petition for review. (App. B to Petition, 34.)

ARGUMENT

The Court below dismissed the petition for review on the ground that a decision by the Court on the validity of the Board orders "would have no effect because the rights and duties of the parties are now controlled by the bargaining agreement subsequently entered into." (App. B to Petition, 37.) This statement has reference to the Back to Work agreement of September 21, 1962 between ALPA and Southern, thereafter fully implemented, which finally resolved their dispute.

None of the arguments set forth in the petition warrant a review of this matter by the Supreme Court. The decision of the Court of Appeals is not in conflict with any decisions of this Court or of any other Court of Appeals, nor does the petition raise an important or substantial Federal question. The Court of Appeals did not err, nor was a duty to petitioners violated by the consummation by Southern and ALPA of an agreement providing that the seniority of pilots shall be determined by their date of hire.

I. The decision below does not conflict with previous decisions of this Court

The petitioners argue at pages 7-8 of the petition that the decision below conflicts with previous decisions of this Court.

A material distinction between such decisions and the decree now sought to be reviewed has been overlooked by petitioners. The decisions to which they have referred at pages 7-9 of the petition held that the continuing effects of antecedent unfair labor practices should not go unremedied, notwithstanding the passage of time and the events which intervened since those practices occurred. In contrast, petitioners here argue that a remedy provided by the Board, and fully adopted and implemented by the parties, should be vacated notwithstanding the passage of time and events which intervened since the unfair labor practices occurred. The decisions upon which they rely directed that specified affirmative action be taken. The relief sought by petitioners is a direction that specified administrative orders, which, because they have been complied with no longer control the rights and duties of the parties to which they are addressed, be vacated. Under such circumstances, modification of the orders of the Board would leave the parties to the collective bargaining agreement unaffected. The validity of the collective bargaining agreement between the parties is not challenged in these proceedings nor could it properly be challenged herein.

2. The decision of the Court of Appeals does not conflict with decisions of other circuits

The petitioners contend at pages 8 and 9 of their petition that the decision below conflicts with decisions of other circuits. In each of the decisions cited by petitioners in support of this proposition, the National Labor Relations Board sought judicial enforcement of a remedy for the continuing effects of antecedent unfair labor practices though such practices were no longer continuing to occur. As discussed above, such decisions are not relevant, since there has been full compliance with the Board's remedial orders, and the petitioner, unlike the National Labor Relations Board in the decisions referred to, is aggrieved solely by a collective agreement which is not dependent upon the Board's orders for its validity.

3. The petition does not present an important Federal question

Petitioners assert at page 9 that an important Federal question is presented because the Civil Aeronautics Board has issued orders dealing with a labor dispute. Petitioners did not avail themselves of the opportunity to raise that issue before the Board, nor was it passed upon in the decision of the Court of Appeals sought to be reviewed. Aside from its substantive lack of merit, such an issue should not be used to obscure the single reason for petitioners' attack upon the Board's orders—their dissatisfaction with that portion of the agreement between Southern and ALPA providing that seniority of pilots shall be based upon date of hire. Petitioners would have this Court set aside a remedy provided for serious unfair labor practices, grant them preferred seniority positions unwarranted by their hiring dates, and restore the unrest

which once prevailed at the expense of the labor relations stability which has now been achieved between Southern and its employees. Such a claim raises no substantial federal question.

4. The Court of Appeals did not err

The decision of the Court of Appeals which petitioners now seek to review in this Court is not inconsistent with the decision reached by the United States District Court for the Northern District of Georgia in *Helman* v. *Southern Airways, Inc.*, 210 F. Supp. 407, an action brought by petitioners. There, in a collateral proceeding, petitioners sought to attack the validity of orders of the Board of which they here complain, and by such an attack, to set aside the current collective bargaining agreement between Southern and ALPA. They have failed to recognize that the validity of that agreement is to be tested not upon a review of the Board's orders, but rather by a separate and independent examination of rights and obligations created by the Railway Labor Act. Nor is the action below inconsistent with the determination of the United States District Court for the Middle District of Tennessee in *ALPA* v. *Southern Airways, Inc.*, 49 LRRM 3145 (1962) (not otherwise reported). There, *inter alia*, injunctive relief was granted to ALPA against Southern Airways restraining that carrier from insisting, as a condition of reaching an agreement with ALPA, upon the unreviewable and unilateral right to discipline striking employees. (R. 108, footnote 2; R. 110, 114, 121-123)

The petitioners have failed to raise a timely objection to the Board's orders, and events have not stood still. They now complain that they have been unable to reach the agreement between Southern and ALPA

in proceedings seeking review of the Board's orders. Despite their actual notice of proceedings before the Board at least as early as September 23, 1961, and their actual notice of the Board's proposed decision on May 25, 1962, they made no move until October 29, 1962, some five weeks after ALPA and Southern had consummated and proceeded to implement an agreement ending their dispute, before raising their grievance for the first time in any form.[6]

5. The Board orders sought to be reviewed are valid and proper

a. *The Board possessed jurisdiction to issue the orders in question.* Petitioners' contentions to the contrary are without merit. Plain and unambiguous language of Section 401(k)(4) of the Federal Aviation Act of 1958 (49 U.S.C.A., Section 1371(k)(4)) specifically requires air carriers, as a condition of the holding of a certificate, to comply with the requirements of the Railway Labor Act. Sections 401(g), 1002(a), (b) and (c) of the same statute (49 U.S.C.A., Section 1371(g) and Sections 1482(a), (b) and (c)) authorize the Board to compel compliance with the provisions of the Act and to revoke an air carrier's certificate for intentional failure to comply with any condition thereof.[7] Legislative history of Section 401(k) shows that it was enacted for the specific purpose of providing effective machinery for the enforcement of the provisions of the Railway Labor Act applicable to air carriers by the agency administering

[6] The contention that the Board lacked jurisdiction was not properly reviewable by the Court of Appeals under Section 1006(e) of the Federal Aviation Act because it was not presented to the Board. It was raised originally by Southern but abandoned when the Hearing Examiner's Initial Decision found jurisdiction

the Civil Aeronautics Act, predecessor statute to the Federal Aviation Act of 1958.[5] Moreover, the Board, under Section 412 of the Federal Aviation Act (49 U.S.C.A., Section 1382), has often passed upon questions relating to the rights and obligations of carriers under the Railway Labor Act. *Airlines Negotiating Conference*, 8 C.A.B. 354 (1947); *Six Carrier Mutual Aid Pact* (Docket No. 9977, decided May 20, 1959).

b. *The effect of the Board orders.* Petitioners argue that the Board orders were invalid because the Board did not have authority to issue guidelines for subsequent collective bargaining between ALPA and Southern. The Board's order of July 5, 1962, simply held, however, that conditions precedent to consummation of an agreement imposed by Southern with respect to seniority and discipline were violative of the Railway Labor Act. Its subsequent order of August 27, 1962, clarified, at Southern's request, the nature of the obligation which the Board's remedial order placed upon that carrier. The Board required Southern to bargain in good faith with ALPA. ALPA and Southern were left free to negotiate a collective bargaining agreement in good faith and consistent with the requirements of the Railway Labor Act. In no sense did the Board prescribe the terms of the ultimate agreement, beyond prohibiting an insistence by the

[5] Hearings on H.R. 5234 before House Committee on Interstate and Foreign Commerce, March and April 1938, pages 202, 213, 370; Hearings on H.R. 9738 before House Committee on Interstate and Foreign Commerce, March and April 1938, pages 10, 213, 215, 237, 238; Hearings on S. 2 before Subcommitte of Senate Committee on Interstate Commerce, March and April 1938, pages 22, 24, 450, 585, 589, 590; Hearings on S. 3659 before Subcommittee of Senate Committee on Interstate Commerce on April 26 and 27, 1938, page 39; House Report No. 2065, 75th Cong., 2d Sess., page 69.

carrier upon contract demands which had theretofore been found to be unlawful.

c. The Board was not required to make petitioners parties to the proceeding before it. Petitioners argue that they were indispensible parties to the proceeding before the Board and the failure of the Board to bring them in as parties invalidates its orders. This objection to the Board orders is not available to petitioners. Section 1006(e) of the Federal Aviation Act (49 U.S.C.A., Section 1486(e)) provides that no objection to the order of the Board shall be considered by the Court unless such objection shall have been urged before the Board, or if not so urged, that there was reasonable ground for failure to do so. Petitioners made no claim of indispensability until October 29, 1962, when they petitioned the Board to reopen the proceedings and permit their intervention almost three months after the Board's order had been issued. There was no reasonable ground for their failure to raise this question at an earlier date; they were admittedly aware of the proceedings before the Board and the issues involved as early as September 23, 1961; and had actual notice of the Board's proposed order not later than May 25, 1962.[6]

The Board's rules provide for intervention in Board proceedings upon the filing of a petition for intervention and a showing of an adequate interest in the proceeding. (*Supra*, p. 7) Petitioners did not seek to

[6]Notices of the hearings before the Board were filed in the Federal Register on October 28, 1960 (Vol. 25, page 10372) and on November 8, 1960 (Vol. 25, page 10667), *supra*, p. 7. The hearing before the Board did not begin until December 1, 1960. Thus petitioners had legal notice of the proceeding under Section 8 of the Federal Register Act (44 U.S.C.A., Section 308—App. B., p. 27).

intervene pursuant to these rules until long after the proceeding had been completed and the Board's orders had become moot.

d. *The Board orders are supported by the record.* The Board found that Southern had violated the statute by demanding, as a condition of agreement, the unilateral and unreviewable right to discipline or discharge strikers. Such a demand was inconsistent with the right of employees to have their grievances adjusted in accordance with the procedures established pursuant to Section 204 of the Railway Labor Act (R. 133). Petitioners contend that this finding is not supported by the record because Southern's position was not inflexible, and that this demand was abandoned by Southern after February 16, 1962. The Board found that such a demand was inflexibly made by Southern, however (R. 69), and there is no evidence that it was ever abandoned. Indeed, it was defended by Southern before the Board as a proper demand, (R. 48.) Under such circumstances, the Board properly held that Southern violated the Railway Labor Act. See *Railroad Trainmen* v. *Georgia Railway*, 305 F. 2d 605 (5th Cir. 1962); *Wilson & Co., Inc.* v. *NLRB*, 120 F. 2d 913 (7th Cir. 1941).

The Board found that Southern violated the Railway Labor Act by demanding as a condition of agreement that the striking pilots forfeit all seniority accrued by them for service in Southern's employ prior to the strike and that their seniority should commence as of the date on which they returned to work. (R. 70.) Such a demand is unlawful *per se*. *Erie Resistor Corp.* v. *NLRB*, 373 U.S. 221 (1963). The Board found that this demand was made to punish the pilots for exercising their lawful right to strike (R. 121).

Petitioners, at pages 20-21, contend that Southern had a legal right to make this demand. Such a contention is contrary to prevailing authority, which has established that it is coercive and a failure to bargain in good faith for an employer to condition any agreement to be reached upon a forfeiture of seniority by strikers and a grant of superseniority to the replacements. *Ballas Egg Products, Inc.* v. *NLRB*, 283 F. 2d 871 (6th Cir., 1960); *Olin Mathieson Chemical Corp.* v. *NLRB*, 232 F. 2d 158 (4th Cir., 1956), aff'd. 352 U.S. 1020 (1957); *Swarco, Inc.* v. *NLRB*, 303 F. 2d 668 (6th Cir., 1962); *NLRB* v. *California Date Growers Association*, 259 F. 2d 587 (9th Cir., 1958); *Stewart Die Casting Corp.* v. *NLRB*, 114 F. 2d 849, 7th Cir., 1940), *enforcing as modified*, 14 NLRB 872, *cert. den.* 312 U.S. 680 (1941).

The recent decision of this Court in *Erie Resistor Case*, *supra*, p. 21, makes it clear that Southern's conduct was illegal *per se*, even in the absence of the Board's finding that Southern's purpose in making such a demand was to punish the striking pilots. Moreover, the Board properly found that it was unnecessary for Southern to promise super-seniority to the replacements in order to enlist them into Southern's employ, and that Southern gave no such assurances to the replacements at the time they were hired. (R. 45, 46, 49-52.)

e. *ALPA did not violate any duty owed petitioners.* Petitioners claim that ALPA did not properly represent them because they are entitled to a priority in job and seniority status notwithstanding Southern's unfair labor practices and bad faith bargaining. This claim was never asserted to the Board until the pro-

ceeding was moot. Moreover, this is nothing more than a claim that Southern should have discriminated in their favor, by granting them superseniority. Understandably, petitioners also claim a right to the assistance of ALPA to achieve such favorable discrimination for them at the expense of the striking pilots, even though such striking pilots would all have returned to work on July 12, 1960, but for the unlawful conduct of the employer.

Petitioners' assertion that ALPA has failed to discharge duties owed them is based simply upon their obvious desire for preferred treatment. However, petitioners do not suggest any legal or equitable justification for an abandonment of the job and seniority rights of the pilots hired prior to June 4, 1960, in favor of the replacement pilots hired on or after that date. Nor do they deny that it was the paramount and enforceable obligation of ALPA to protect the striking pilots against the effect of the company's unlawful conduct.

Petitioners' failure to avail themselves of the liberal procedures for intervention in proceedings before the Civil Aeronautics Board after they had, as they admit, actual notice of such proceedings is not traceable to the violation of any duty owed them by ALPA.

Petitioners condemn the execution between ALPA and Southern of the agreement of September 21, 1962. The provisions of that agreement specifically challenged by petitioners provide for the reinstatement of the striking pilots to their former employment with seniority unimpaired. However, petitioners insist that the returning striking pilots were entitled to something less than reinstatement with seniority unimpaired.

That insistence sharply conflicts with a uniformly accepted body of law and with the orders of the Board which closely follow that body of law. Indeed, had Southern refused to reinstate, with seniority unimpaired, employees whose strike was prolonged by that employer's unfair labor practice, such conduct itself would be discriminatory and illegal. See *Washougal Woolen Mills*, 23 NLRB 1 (1940); *Shenandoah Dives Mining Co.*, 34 NLRB 1153 (1941).

Viewed in proper perspective, petitioners' claim that ALPA has violated a duty owed to them is simply an objection to the uniform application of the principle of seniority to them. Agreements between ALPA and Southern have long contained provisions conferring upon pilots a seniority classification based upon date of hire by Southern. Such seniority classification has always governed the pilots' job rights, including wages, bidding, sequence of furlough, and many other such matters. This principle is applied within the group uniformly, and without discrimination.

Seniority is plainly a proper subject for collective bargaining between an employer and the representative of his employees. See, e.g. *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953); *Inland Steel Company* v. *NLRB*, 170 F. 2d 247, *cert. den.* 336 U.S. 960 (1949). The uniform application of the principle of seniority based upon date of hire has been sustained as a fair and reasonable exercise of the duty of a collective bargaining representative. *Grand Lodge* v. *Girard Lodge*, 384 Pa. 248, 120 A.2d 523 (1956).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

EDWARD J. HICKEY, JR.
JAMES L. HIGHSAW, JR.
620 Tower Building
Washington 5, D. C.
Counsel for Air Line Pilots Association, International

Of Counsel:

HENRY WEISS
HERBERT N. LEVY
605 Third Avenue
New York, N. Y. 10016

MULHOLLAND, HICKEY & LYMAN
620 Tower Building
Washington 5, D. C.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1962

No. 17,362

SOUTHERN PILOTS ASSOCIATION, LEWIS H. HOLMAN, ET AL., *Petitioners*,

v.

CIVIL AERONAUTICS BOARD, *Respondent*.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *Intervenor*.

Before: Bazelon, Chief Judge, Prettyman, Senior Circuit Judge, and Wright, Circuit Judge, in Chambers.

Order

On consideration of petitioners' petition for rehearing, it is

ORDERED by the Court that the petition be denied.

Per Curiam.

Dated: July 8 1963

Note: The order contains a stamped notation to the effect that it was filed on July 8, 1963.

APPENDIX B

Federal Register Act

1. Section 8 of the Act (44 U.S.C.A., Section 308):

Whenever notice of hearing or of opportunity to be heard is required or authorized to be given by or under an Act of Congress, or may otherwise properly be given, the notice shall be deemed to have been duly given to all persons residing within the States of the Union and the District of Columbia, except in cases where notice by publication is insufficient in law, if said notice shall be published in the Federal Register at such time that the period between the publication and the date fixed in such notice for the hearing or for the termination of the opportunity to be heard shall be (a) not less than the time specifically prescribed for the publication of the notice by the appropriate Act of the Congress; or (b) not less than fifteen days, when no time for publication is specifically prescribed by the Act, without prejudice, however, to the effectiveness of any notice of less than fifteen days where such shorter period is reasonable.

Regulations of Civil Aeronautics Board

1. Part 302 of the Board's Economic Regulations, 17 F.R. 3020, et seq., as amended; 26 F.R. 8054; 27 F.R. 12545:

Section 302.15(a):

(a) Who may intervene. (1) Any person who has a statutory right to be made a party to a proceeding shall be permitted to intervene therein.

(2) Any person whose intervention will be conducive to the ends of justice and will not unduly impede the conduct of the Board's business may be permitted to intervene in any proceeding.

Section 302.15(c):

(c) Petition to intervene. (1) Contents. Any person desiring to intervene in a proceeding shall file a petition in conformity with this part setting forth the facts and reasons why he thinks he should be permitted

to intervene. The petition should make specific reference to the factors set forth in paragraph (b) of this section.

(2) Time for filing. Unless otherwise ordered by the Board, any petition for leave to intervene shall be filed within the following time limits:

(i) In a proceeding where the Board issues a show cause order proposing fair and reasonable mail rates, such petition shall be filed within the time specified for filing notice of objection.

(ii) In all other proceedings, including mail rate proceedings where no show cause order is issued, the petition shall be filed with the Board prior to the first prehearing conference, or, in the event that no such conference is to be held, not later than fifteen (15) days prior to the hearing.

(iii) A petition to intervene in any Board proceeding filed by a city, or other public body, or a chamber of commerce shall be filed with the Board not later than the last day prior to the beginning of the hearing thereon.

A petition for leave to intervene which is not timely filed shall be dismissed unless the petitioner shall clearly show good cause for his failure to file such petition on time.

(3) Answer. Any party to a proceeding may file an answer to a petition to intervene, making specific reference to the factors set forth in paragraph (b) of this section, within seven (7) days after the petition is filed.

(4) Disposition. The decision granting, denying or otherwise ruling on any petition to intervene may be issued without receiving testimony or oral argument either from the petitioner or other parties to the proceeding.

Section 302.30(c):

(c) Effect of failure to file timely and adequate exceptions. No objection may be made on brief or at a later time to an ultimate conclusion which is not expressly made the subject of an exception in compliance

with the provisions of this section: *Provided, however*, That any party may file a brief in support of the decision and in opposition to the exceptions filed by any other party.

Section 302.37(a):

(a) Board orders subject to reconsideration; time for filing. Unless an order or a rule of the Board specifically provides otherwise, any party to a proceeding may file a petition for reconsideration, rehearing or reargument of (1) a final order issued by the Board or (2) an interlocutory order issued by the Board which institutes a proceeding or defines the scope and issues of a proceeding or suspends a provision of a tariff on file with the Board. Unless the time is shortened or enlarged by the Board, petitions for reconsideration shall be filed, in the case of a final order, within twenty (20) days after service thereof, and, in the case of an interlocutory order, within ten (10) days after service. However, neither the filing nor the granting of such a petition shall operate as a stay of such final or interlocutory order unless specifically so ordered by the Board. Within ten (10) days after a petition for reconsideration, rehearing, or reargument is filed, any party to the proceeding may file an answer in support of or in opposition to the petition. Motions for extension of time to file a petition or answer, and for leave to file a petition or answer after the time for the filing thereof has expired, will not be granted by the Board except on a showing of unusual and exceptional circumstances, constituting good cause for movant's inability to meet the established procedural dates.

Section 302.201:

Any person may make a formal complaint to the Board with respect to anything done or omitted to be done by any person in contravention of any economic regulatory provisions of the act, or any rule, regulation, order, limitation, condition or other requirement established pursuant thereto. Every formal complaint shall conform to the requirements of § 302.3, concerning the form and filing of documents. The submission of a formal complaint by a person other than an Enforcement Attorney (hereinafter called a third party)

shall not in itself result in the institution of a formal economic enforcement proceeding and a hearing with respect to the complaint unless and until the Director of the Bureau of Enforcement dockets a petition for enforcement with respect to such complaint, or a portion thereof, in accordance with § 302.206. * * *.

Section 302.207:

(a) Within fifteen (15) days after the date of service of a petition for enforcement docketed pursuant to § 302.206, the respondent shall file an answer to the complaint attached thereto or incorporated therein unless an answer has already been filed in accordance with § 302.204. Any requests for extension of time for filing of answer to complaint attached to or incorporated in a petition for enforcement shall be filed with the Board in accordance with § 302.17.

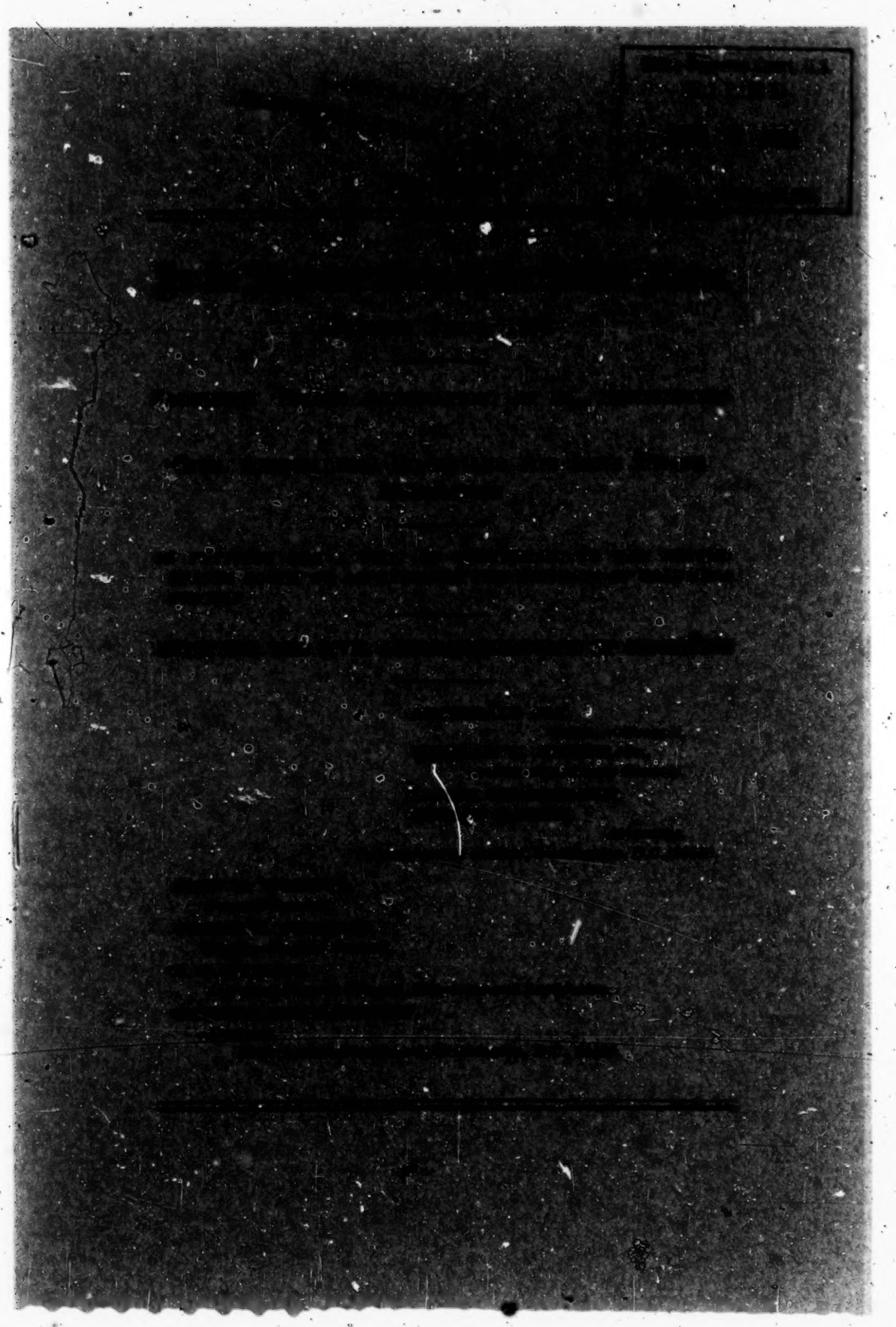
(b) All answers shall conform to the requirements of § 302.8(a)-(2) and shall fully and completely advise the parties and the Board as to the nature of the defense and shall admit or deny specifically, and in detail, each allegation of the complaint unless the person complained of is without knowledge, in which case, his answer shall so state and the statement shall operate as a denial. Allegations of fact not denied or controverted shall be deemed admitted. Matters alleged as affirmative defenses shall be separately stated and numbered and shall, in the absence of a reply, be deemed to be controverted.

Section 302.209:

The Board (or the Examiner) may, in its discretion, require or permit the filing of a reply in appropriate cases, otherwise no reply shall be filed.

Section 302.210:

The parties to an economic enforcement proceeding shall be the Board (represented by an Enforcement Attorney), the respondent, any person whose formal complaint alleged violations which were later covered by the petition for enforcement, and any other person permitted to intervene pursuant to § 302.15.



INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	7
Conclusion	11

CITATIONS

Cases:	
Air Line Pilots Ass'n v. *Civil Aeronautics Board*, C.A.D.C., No. 17,149	4
Ford Motor Co. v. *Huffman*, 345 U.S. 330	8
Holman v. *Southern Airways, Inc.*, 210 F. Supp. 407	5, 9, 10
Humphrey v. *Moore*, 375 U.S. 335	8, 10
Mechling Barge Lines v. *United States*, 368 U.S. 324	7
National Labor Relations Board v. *Erie Resistor Corp.*, 373 U.S. 221	10
Southern Airways v. *Civil Aeronautics Board*, C.A. 5, No. 19,801	4
Statutes:	
Federal Aviation Act of 1958, as amended, 72 Stat. 731, 49 U.S.C. 1301 *et seq.*:	
Section 401(g), 49 U.S.C. 1371(g)	3
Section 401(k)(4), 49 U.S.C. 1371(k)(4)	2
Section 1002(c), 49 U.S.C. 1482(c)	2
Railway Labor Act, 44 Stat. 577, as amended, 49 Stat. 1189:	
Title I	2
Title II	2

722-382—64

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 743

SOUTHERN PILOTS ASSOCIATION, ET AL., PETITIONERS

v.

CIVIL AERONAUTICS BOARD AND AIR LINE PILOTS ASSOCIATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported in 323 F. 2d 288. The opinions and orders of the Civil Aeronautics Board (R. 101, 206, 223) are not yet reported.

JURISDICTION

The judgment below was entered on June 13, 1963 and a petition for rehearing was denied on October 14, 1963. The petition for a writ of certiorari was

filed on January 10, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

An order of the Civil Aeronautics Board directing an airline to resume bargaining in good faith with a pilots union and suggesting certain guidelines was followed by the agreement of the airline and the union upon a collective bargaining contract. The question presented is whether in these circumstances the court below properly dismissed a petition filed by certain nonunion pilots challenging the Board order, on the ground that their alleged injury flows from the bargaining agreement and any decision as to the validity of the Board order would have no effect.

STATEMENT

Title II of the Railway Labor Act (Pet., p. 32) requires air carriers to comply with the Title I requirement (Pet., p. 27) "to exert every reasonable effort to make and maintain agreements" with employee organizations concerning rates of pay, rules, and working conditions. Section 401(k)(4) of the Federal Aviation Act (Pet., p. 24) provides that it "shall be a condition upon the holding of a certificate by any air carrier that such carrier shall comply with title II of the Railway Labor Act * * *", and Section 1002 (c) (Pet., p. 24) vests jurisdiction in the Board to issue an appropriate order to compel compliance "with any provision of this Act or any requirement established pursuant thereto * * *". Under these various provisions, the Board considers that it is empowered, in its sound discretion, to entertain complaints alleg-

ing violations by air carriers of the duty to conduct good faith labor negotiations; to determine whether there has been a violation; and, if so, to enter an order directing the carrier to bargain in good faith.[1]

In this case, Southern Airways and Air Line Pilots Association (ALPA), the duly certified bargaining representative of the Southern pilots, entered into negotiations concerning desired changes in an earlier labor agreement. After lengthy negotiation and unsuccessful attempts at mediation, the Southern pilots went on strike on June 5, 1960. Southern immediately began to hire replacement pilots and gradually resumed full operations. In the interim, mediation efforts continued, with the parties becoming deadlocked over the job retention rights and seniority status of the replacement pilots in relation to the striking pilots and Southern's right to discipline the striking pilots for misconduct during the strike. On the basis of a complaint by ALPA, and after full hearings, the Board found that Southern had improperly insisted that the returning strikers should have seniority only from the date of their return to work (with a consequent forfeiture of previously acquired seniority) and also demanded unjustifiably a right to discipline the returning pilots without regard to the grievance procedures provided by the Railway Labor Act (R. 113, 119–120). The Board directed

[1] Various criminal and civil sanctions are provided for failure to comply with a Board order. One such latter sanction (Section 401(g), Pet., p. 23) is revocation of the carrier's certificate for intentional failure to comply "with an order of the Board commanding obedience to the * * * condition [of the certificate] * * * found by the Board to have been violated. * * *"

Southern to resume negotiations (R. 134), and set forth in its opinion principles, derived from relevant judicial decisions, which were to be observed by Southern in order to constitute good faith bargaining (R. 131–132).[2] Insofar as is here pertinent, these were that Southern could retain as permanent employees the replacement pilots hired prior to July 12, 1960, the date on which the Board found that Southern's unlawful demands had created the impasse which led to the breakdown of negotiations, but that Southern should reinstate, with unimpaired seniority, all striking pilots not replaced prior to that date.

Both ALPA and Southern sought judicial review of the Board's order,[3] but Southern also reopened negotiations with ALPA (R. 204). Bargaining was resumed under the auspices of the National Mediation Board, and culminated in a new agreement on September 21, 1962 (see R. 219–223). That agreement provided for the withdrawal of the ALPA and Southern petitions for judicial review, the reemployment of the striking pilots, and the determination of the

---

[2] The Board stated (R. 132) that:

> In providing these guidelines we do not intend to preclude the parties from reaching an agreement which may differ therefrom. On the other hand, any substantial and unjustifiable deviation from these guidelines will, if persisted in, be taken into consideration in determining whether the requirement of good faith bargaining has been met.

[3] *Air Line Pilots Ass'n* v. *Civil Aeronautics Board*, C.A.D.C., No. 17,149; *Southern Airways* v. *Civil Aeronautics Board*, C.A. 5, No. 19,801, transferred to the District of Columbia Circuit because of the earlier filed ALPA petition and assigned No. 17,263.

seniority of all pilots from their date of hire. Since the returning pilots had been hired earlier than the replacement ones, the effect appears to have been that some of the replacement pilots serving as captains were reduced to copilots, and other replacements were furloughed to make room for the returning strikers.[4]

Shortly after the new agreement, the replacement pilots (the petitioners here) formed their association, and took various steps designed to preserve or obtain restoration of the positions which they had held with Southern. They filed in the court of appeals a petition for review of the Board's order directing a resumption of bargaining, and a petition with the Board seeking leave to intervene in its proceeding and requesting the Board to set aside its orders. Moreover, in November 1962 they brought suit in the District Court for the Northern District of Georgia against ALPA and Southern to enjoin them from putting the new collective bargaining agreement into effect.[5] The latter cause was dismissed on November 9, 1962 on the ground that the suit constituted an attack on the Board's orders (*Holman* v. *Southern Airways, Inc.*, 210 F. Supp. 407), and an appeal was taken to the

[4] The agreement provided that all replacement pilots hired prior to July 12, 1960 were to be retained in the employ of the company, and that the other replacement pilots were to be placed on a preferential hiring list (R. 221).

[5] Additionally, on October 9, 1962, they filed a petition with the National Mediation Board (File C-3322) requesting it to conduct an election of bargaining representatives in the hope that the replacement pilots' association would supplant ALPA as the bargaining representative with Southern.

Fifth Circuit. That case is apparently being held in abeyance pending the disposition of this litigation.

The Board dismissed the petition to it (R. 224), and petitioners amended their petition for judicial review to encompass this dismissal order as well as the earlier Board orders. In declining to act, the Board stated that it had retained jurisdiction in its proceeding only to insure that Southern bargained in good faith, rather than for the purpose of passing on the merits of any contract which might result from the further negotiations. It went on to find (R. 226) that "[t]here is no showing of any lack of good faith bargaining, and any altering or vacating of the Board's order would not in any way affect the contract over which we lack jurisdiction."

The court of appeals dismissed the amended petition for review on grounds of mootness, stating (Pet., p. 37):

> Petitioners allege that the Board order stands in the way of their attempt, in other courts, to enjoin operation of the bargaining agreement on the ground that the union, with the concurrence of the airline, discriminated against the replacement pilots. But the proceeding now before us is solely for review of the Board's order and a decision by this court on the validity of that order would have no effect because the rights and duties of the parties are now controlled by the bargaining agreement subsequently entered into. The Board, as it pointed out in its opinion denying petitioners' application for rehearing and intervention, has no jurisdiction to pass upon designations of bar-

gaining agents or charges of discrimination in the representation function.[9] Petitioners do not suggest otherwise.

[9] The Board stated: "* * * [T]he Board does not consider that it can look behind the National Mediation Board's designation of ALPA as the collective bargaining agent for [the airline's] pilots or inquire into whether the union had discriminated against petitioners in its representation functions. *Air Line Pilots Association* v. *Southern Airways, Inc.*, *supra*, Note. 4.

ARGUMENT

The decision below is correct and the petition presents no question of general importance warranting further review.

The Board found that Southern Airways, Inc. had violated its statutory duty to bargain in good faith by making certain demands in relation to the retention and seniority of replacement employees and by demanding non-reviewable disciplinary action against striking employees. After setting forth guidelines, the Board ordered Southern Airways to bargain in good faith with ALPA. Accepting the Board's mandate, Southern and ALPA proceeded with negotiations and ultimately entered into voluntary collective bargaining agreements. The rights of the parties are now controlled by the collective bargaining agreement, not the Board's order. Even if the order were to be set aside, the contract between Southern Airways and ALPA would remain in force and petitioners would still be subject to the seniority provisions to which they object. Accordingly, insofar as petitioners' particular claim of injury is concerned, the Board's order "is presently devoid of practical effect" (*Mechling Barge Lines* v. *United States*, 368 U.S. 324,

328 (1961)), and petitioners' attack upon it was properly dismissed by the court of appeals.

The terms of the contract were not dictated by the Board, but were voluntarily agreed upon by the parties. For, while the Board's order laid down certain "guidelines," these were not binding upon Southern and ALPA in the sense of foreclosing other arrangements. On the contrary, the Board made it clear that "In providing these guidelines we do not intend to preclude the parties from reaching an agreement which may differ therefrom" (R. 132).[6] And neither of the signatory parties claims that it was forced to enter into the agreement against its will.

Nor is there any foundation for petitioners' contention that the Board's order stands in the way of their efforts, in other courts, to enjoin the operation of the bargaining agreement itself on the ground that the ALPA discriminated against them in the exercise of

[6] Seniority is a matter of negotiation and contract. *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338–339; *Humphrey* v. *Moore*, 375 U.S. 335. Southern's settlement here was entirely voluntary in the legal sense. The Board's order, entered on July 5, 1962, granted Southern a 30-day period within which to resume bargaining. Although filing a petition for review and a petition for stay of the order, Southern resumed bargaining on July 16, 1962, without awaiting action by the court of appeals on the petition for stay. That petition was never acted upon, presumably because of Southern's resumption of bargaining. The petition for review was dismissed as a part of the settlement agreement.

its representative function. As basis for that contention, petitioners cite *Holman* v. *Southern Airways, Inc.*, 210 F. Supp. 407 (N.D. Ga.), in which the district court dismissed their injunction suit for want of jurisdiction, deeming it a collateral attack upon the Board's order. Apparently, however, the complaint in that case was directed primarily to the Board's order, and only secondarily, if at all, to the bargaining agreement. Thus, the allegations of the complaint were summarized by the district court as follows (210 F. Supp. 407, 408):

> The plaintiffs assert in their petition that the orders of the Civil Aeronautics Board were made without their being given their day in court. The plaintiffs also assert, as the basis of their action, that the orders of the Board operated adversely and improperly upon their employment rights, and that the defendant Airline Pilots Association did not represent the plaintiffs but, in fact, acted to the detriment of the plaintiffs. The plaintiffs further allege that the orders of the Civil Aeronautics Board, which they are challenging herein, and the agreements made pursuant thereto, are contrary to contractual employment undertakings by defendant Southern Airways, Inc., with the respective individual plaintiffs.

Since jurisdiction to determine the validity of the Board's orders is vested exclusively in the court of appeals, the district court properly disclaimed

competence to deal with these allegations. But a court of appeals decision setting aside the Board's order is plainly not a prerequisite to challenging the validity of the contract.[7] To the extent the decision in *Holman* may have intimated the contrary, it can be corrected in the appeal now pending in the Fifth Circuit.

Petitioners' further assertion that they should be entitled to a decision on the merits because the Board's order retained jurisdiction over the proceeding and because the Board might act to preclude Southern from entering into any other agreement is unsound. The Board expressly stated (R. 226) that it "retained jurisdiction in this proceeding to insure that the carrier discharged its duty to bargain in good faith, and not for the purpose of passing on the merits of any contract which the parties might ultimately negotiate." Any additional Board action would arise only from a further complaint and finding of an unfair labor practice by Southern.

[7] We believe, however, that it will be difficult for petitioners to sustain on the merits their contention that it was discriminatory to accord all pilots seniority in accordance with their dates of hire, and that the replacement pilots were entitled to superseniority. See *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221; *Humphrey* v. *Moore*, 375 U.S. 335.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
WILLIAM H. ORRICK, JR.,
Assistant Attorney General.
LIONEL KESTENBAUM,
GERALD KADISH,
Attorneys.

JOHN H. WANNER,
General Counsel,
JOSEPH B. GOLDMAN,
Deputy General Counsel,
O. D. OZMENT,
Associate General Counsel,
Litigation and Legislation,
PETER B. SCHWARZKOPF,
Attorney.
Civil Aeronautics Board.

MARCH 1964.

U. S. GOVERNMENT PRINTING OFFICE: 1964

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 19 1964
JOHN F. DAVIS, CLERK

No. 743

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

SOUTHERN PILOTS ASSOCIATION, et al.;
Petitioners

v.

CIVIL AERONAUTICS BOARD,
Respondent

and

AIR LINE PILOTS ASSOCIATION,
Intervenor.

REPLY BRIEF OF PETITIONERS

PHILIP F. HERRICK
NICHOLAS E. ALLEN
1001 15th Street, N.W.
Washington, D.C. 20005
Attorneys for Petitioners

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 743

SOUTHERN PILOTS ASSOCIATION, et al.,
Petitioners

v.

CIVIL AERONAUTICS BOARD,
Respondent

and

AIR LINE PILOTS ASSOCIATION,
Intervenor.

REPLY BRIEF OF PETITIONERS

I. The Relief Petitioners Seek Here

The Intervenor contends (Brief, p. 16) and the Respondent appears to contend (Brief, p. 2) that the relief Petitioners seek is from the agreement of September 21, 1962 entered into between the Intervenor and Southern Airways, which agreement the Peti-

tioners have attacked in the courts of the Fifth Circuit. The Intervenor and the Respondent are incorrect in so characterizing the Petitioners' contention. The Petitioners here seek relief from an order of the Civil Aeronautics Board which continues in effect as a bar to the relief which they seek in the Fifth Circuit. The relief they seek in the Fifth Circuit is from the agreement of September 21, 1962.

The Respondent also contends (Brief, p. 9), as does the Intervenor (Brief, p. 17), that the Complaint which the Petitioners filed in the Federal District Court in Georgia was directed primarily to the Board's order and only secondarily, if at all, to the bargaining agreement. This assertion is likewise incorrect. In its Complaint in Georgia the Petitioners said: "There is an immediate need for injunctive relief to preserve the status quo and protect the plaintiff against any further actions on the part of the defendants under the aforesaid contract of September 21, 1962 detrimental to the plaintiffs." The Petitioners' first prayer in their Complaint before the Georgia court was: "That defendants and each of them . . . be temporarily restrained and enjoined, at first during the pendency of this action and thereafter permanently, from enforcing or otherwise putting into operation the alleged contract of September 21, 1962." There were also prayers that Southern Airways be enjoined from dismissing any of the plaintiffs or according to any other person a seniority superior to theirs, that the Intervenor be enjoined from interfering in any manner with the employment status of the plaintiffs, and that both Southern Airways and the Intervenor be enjoined from conducting any further proceedings, whether before a court or a governmental agency, which might affect

the employment status of Petitioners, unless the Petitioners be first served with process and be made parties to such proceedings.

II. The Petition Is Timely

At page 2 of its Brief in Opposition to Certiorari, the Intervenor questions the timely filing of the Petition for Certiorari. It says that the time for filing the petition commenced to run when the Court of Appeals denied petitioners' Petition for a Rehearing on July 8, 1963.

A full statement of all matters occurring between the initial decision of the Court of Appeals and the filing of the Petition for Certiorari is as follows:

1. The original decision of the Court of Appeals was issued on July 13, 1963.

2. Petitioners filed a Petition for Rehearing on June 25, 1963, within the 15-day period allowed by Rule 26 of the Court of Appeals.

3. On July 5, 1963 petitioners mailed to the Court of Appeals their Motion for Argument before the Court En Banc. This requested the Court to grant argument before the full court sitting en banc on the Petition for Rehearing filed June 25, 1963.

4. The Petition for Rehearing was denied by the Court on July 8, 1963.

5. On July 8, 1963 the Clerk of Court advised petitioners' counsel that their motion for argument before the court en banc should have been filed within 15 days of the Court's decision of June 13, 1963 under Rule 26 of the Court of Appeals' rules. This rule, however, refers to rehearings, not to arguments en banc.

6. On July 10, 1963 petitioners filed their Motion for Leave to file a Motion for Argument Before the Court En Banc. In this motion they pointed out that neither Rule 26 nor any other rule specifically covers en banc matters.

7. The last-named motion was granted by the Court on July 16, 1963, and the Court ordered that the time for filing a Petition for Rehearing En Banc be extended to July 31, 1963.

8. Petitioners filed their Petition for Rehearing En Banc on July 30, 1963.

9. The Court denied Petitioners' Motion for Rehearing En Banc on October 14, 1963.

It thus appears that the time for filing the Petition for Certiorari commenced to run on October 14, 1963. Any filing of a petition for certiorari between July 8 and October 14, 1963 would have destroyed the jurisdiction of the Court of Appeals to take any further action.

Even if the petition of July 30 was untimely, "where the court allows the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof." *Bowman* v. *Loperena*, 1940, 311 U.S. 262, 266, 61 S. Ct. 201, 203, 85 L. ed. 177. See also *Pfister* v. *Northern Illinois Finance Corp.*, 1942, 317 U.S. 144, 149, 63 S. Ct. 133, 87 L. ed. 146; *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, 1937, 300 U.S. 131, 137-8, 57 S. Ct. 382, 385-6, 81 L. ed. 557; *United States* v. *Healy*, 84 S. Ct. 553, 555 (Feb. 17, 1964).

III. The Tennessee District Court Decision

The Intervenor contends (Brief, p. 17), that the action of the Respondent, Civil Aeronautics Board, is not inconsistent with the determination of the District Court for the Middle District of Tennessee in *ALPA* v. *Southern Airways, Inc.*, 49 L.R.R.M. 3145 (1962). In contradiction to this statement, Petitioners quote from the decision of the said court (49 L.R.R.M. 3155) as follows:

> "15. In the Court's opinion, ALPA itself has not demonstrated its own good faith efforts toward settling the dispute to such a degree that it is now entitled to an equitable injunctive remedy that would require the discharge of the newly-hired pilots.
>
> The economic issues raised by ALPA's Section 6 opener, and other issues brought into the negotiations by the parties, had been fully processed through the procedures prescribed by the Act on February 17, 1960, when the National Mediation Board notified the parties that it was closing its file. Thirty days after that date, the parties were free to resort to self-help. However, before the strike was called, Southern, demonstrating its own good faith, informed ALPA that in the event of a strike, it would attempt to continue operations and that if it were successful in employing replacements, the replacements would have jobs and the strikers would not have jobs. Nevertheless, the strike was called and Southern began hiring replacements. When the parties next met on July 11 and 12, 1960, only forty-five or fifty replacements had been employed. In addition to economic proposals, ALPA conditioned settlement of the dispute upon an agreement that would have effectuated the discharge of these replacements in order to make room for the striking pilots, and further,

upon Southern's agreement to reinstate the strikers "without reprisal." The broad effect of the latter condition was that all strikers, including those who had engaged in assault, vandalism, or other personal misconduct should be reinstated. When Southern refused to accede to these demands, ALPA continued the strike, knowing that more new pilots would be employed. On July 28, 1960, when the final meeting was held, approximately 400 replacements had been employed. Even then, Southern agreed to return to service as many of the strikers as its needs dictated but with seniority dating from the date on which they returned to work. In addition, Southern reserved the right to take disciplinary action against the pilots who had engaged in misconduct during the strike. Except insofar as Southern sought the nonreviewable right to discipline, its demands were both lawful and, under the existing circumstances, reasonable. Nevertheless, the strike continued, more new pilots were employed, and all of the strikers were eventually replaced. While there is some uncertainty as to the exact terms upon which the replacements were employed, the record affirmatively establishes that they were led to believe that, absent legal intervention, their employment would be permanent.

The Court concludes that employment of the new pilots was begun and continued because of ALPA's own demands and its rejection of lawful and reasonable conditions imposed by Southern." It follows that Southern may not now be required to discharge the pilots hired to fill the places of the strikers. NLRB v. Mackay Radio and Telegraph Co., 304 U.S. 333, 345, 2 LRRM 610; NLRB v. Robinson, supra, 251 F. 2d 639, 641; 41 LRRM 2317 (6th Cir. 1958).

In calling and continuing the strike, ALPA was exercising its legal right. However, in now seek-

ing a harsh remedy that would require discharge of the replacements, ALPA does not come into court with clean hands.

16. Upon consideration of the entire record, the Court concludes that the only remedial relief to which plaintiffs are entitled is an injunction restraining Southern from raising as a condition of entering to an agreement with ALPA, the rights of the striking employees to review, through the grievance machinery and procedure contemplated by the Act, any disciplinary action taken by Southern against the striking employees.

Respectfully submitted.

PHILIP F. HERRICK
NICHOLAS E. ALLEN
1001 15th Street, N.W.
Washington, D.C. 20005
Attorneys for Petitioners